Supreme Court, U.S.
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98 950 DEC 10 1998
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

GLEN H. SENGPIEL, DONALD E. KELLY
and DONALD R. GOTTSCHALK,

Petitioners,

VS.

THE B.F. GOODRICH COMPANY, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Sixth Circuit err in holding, contrary to the Eighth Circuit in *Howe v. Varity Corp.*, 36 F.3d 746, 756 (8th Cir. 1994), that an employer in transferring its obligations to provide welfare benefits for employees who had already retired to a successor in interest without the consent of the retirees: (1) did not act as a fiduciary under ERISA; and (2) assuming it acted as a fiduciary, did not breach its fiduciary duty because the benefits were deemed to be not vested?

2. Where medical and life insurance benefit plans contain no provision reserving a right to amend, suspend, or terminate the plans and instead tie eligibility for coverage to eligibility for a pension, and also provide that if the retiree dies, the retiree's spouse will continue to receive those benefits until his or her "death or remarriage," did the Sixth Circuit err in holding, contrary to decisions in other circuits, that the employee, to prove vesting, must show clearly and affirmatively that the employer intended to "guarantee" lifetime benefits?

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, The B.F. Goodrich Pension Plan, The B.F. Goodrich Life Insurance Plan, The B.F. Goodrich Hospital-Surgical Medical Basic Plan, The B.F. Goodrich Prescription Drug Benefit Plan, The B.F. Goodrich Major Medical Plan, Uniroyal Goodrich Tire Company, Uniroyal Goodrich Pension Plan, The Uniroyal Goodrich Tire Company Health Care Plan, The Uniroyal Goodrich Tire Company Prescription Drug Plan, The Uniroyal Goodrich Tire Company Life Insurance Plan, and Michelin North America, Inc., were parties before the court of appeals.

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(1) Whether An Employer Acts As A Fiduciary Under ERISA When It Transfers Its Obligations To Provide Pension And Welfare Benefits To A Successor In Interest? And

(2) Assuming The Employer Acts In A Fiduciary Capacity, Whether It Breaches Its Fiduciary Duty By Transferring A Percentage Of A

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Petitioners Glen H. Sengpiel, Donald E. Kelly and Donald R. Gottschalk respectfully request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit in *Sengpiel v. B.F. Goodrich Co.* is reported at 156 F.3d 660 (6th Cir. 1998) (App. A). The opinion of the district court in *Sengpiel v. B.F. Goodrich Co.* is reported at 970 F. Supp. 1322 (N.D. Ohio E.D. 1997) (App. B).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on September 18, 1998.

The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. §§ 1001, *et seq.* Specifically, the following provisions are involved:

ERISA § 3(14)(A)	(29 U.S.C. § 1002(14)(A));
ERISA § 3(16)(A)	(29 U.S.C. § 1002(16)(A));
ERISA § 3(21)(A)	(29 U.S.C. § 1002(21)(A));
ERISA § 201(1)	(29 U.S.C. § 1051(1));
ERISA § 208	(29 U.S.C. § 1058);

ERISA §§ 404(a)(1)(A) and (B)
(29 U.S.C. §§ 1104(a)(1)(A) and (B));
ERISA §§ 502(a)(1)(B) and (a)(3)
(29 U.S.C. §§ 1132(a)(1)(B) and (a)(3));
ERISA § 4044(a) (29 U.S.C. § 1344(a)).

The text of these provisions are set forth in Appendix D.

STATEMENT OF THE CASE

A. Summary and Overview.

Petitioners, Glen H. Sengpiel, Donald E. Kelly and Donald R. Gottschalk, are former salaried Corporate Group employees of the B.F. Goodrich Company ("Goodrich") who retired before 1986. In 1986, Goodrich entered into a joint venture agreement with the Uniroyal Tire Company ("Uniroyal") by which each company would divest itself of its tire business. Goodrich and Uniroyal formed a new company, the Uniroyal Goodrich Tire Company ("UGTC"), to acquire the assets of and assume the liabilities for their respective tire businesses. In addition to transferring the liabilities for Goodrich's pension and welfare plans for those employees and retirees of its tire division, Goodrich also unilaterally assigned a percentage of the Corporate Group retirees, including petitioners, to UGTC using Social Security numbers as a method of selecting who would be transferred to the new company and who would remain on Goodrich's retirement rolls.

In 1995, UGTC, and its successor, Michelin North America ("Michelin"), substantially reduced the life insurance and increased the medical deductibles and co-pay of those Goodrich retirees who had been transferred to UGTC. After the benefit reductions, petitioners brought a Fed. R. Civ. P. 23 class action under ERISA against Goodrich, its benefit plans, UGTC, its

benefit plans, and Michelin. Petitioners asked to be reinstated to the Goodrich retirement rolls. They alleged that Goodrich breached its fiduciary duty to them by unilaterally and involuntarily transferring them to the UGTC retirement rolls after they had retired from Goodrich. They also asked for a judgment against Goodrich for the increased cost of their welfare benefits resulting from the reductions and for other appropriate equitable relief under ERISA. (App. B at 30a-31a).

The district court deferred consideration of class certification until summary judgment motions were fully considered. (*Id.* at 18a n.1; App. A at 4a n.1). The district court then granted respondents' motions for summary judgment holding: (1) Goodrich was not acting as a fiduciary when it transferred the petitioners from the Goodrich retirement rolls to the UGTC rolls but was acting as an employer implementing a major corporate business decision (App. B at 35a, 36a-43a); and (2) the petitioners could not succeed on their contract-based ERISA claims because their medical and life insurance benefits were not "vested" at the time of their retirement (*Id.* at 36a, 43a-60a).

The Sixth Circuit affirmed the district court on all claims (App. A).

B. Petitioners and Their Retirement.

Glen H. Sengpiel, who was formerly Corporate Director of Employee Relations, retired on December 1, 1976. Donald E. Kelly, who was foreman in plant cleaning at Goodrich's main facility in Akron, retired on June 1, 1982. Donald R. Gottschalk, who was Corporate Employee Relations Representative, retired on January 1, 1982. (App. B at 18a). Each petitioner's Social Security number ends in 4254 or lower. (*Id.* at 25a-26a).

At the time of retirement, petitioners and all other retirees, in consideration of receiving a specified monthly pension, were required to sign a release which provided, in part:

> [I]n consideration of such payments, I hereby release and forever discharge the company from any other obligations under its present or future employee benefit programs except for payment of future premiums on my adjusted group life insurance and payment of hospitalization program benefits to the extent described in such applicable programs.

(*Id.* at 19a, 54a).

C. Goodrich's Benefit Programs.

In 1972, before the enactment of ERISA, Goodrich's employees and retirees were given a binder called "Design for Protection, B.F. Goodrich Salaried Benefit Program." The binder contained brochures describing five benefit programs: Pension, Hospitalization and Surgical, Life Insurance, Major Medical Insurance, and Prescription Drug. (*Id.* at 19a-20a). With the exception of the major medical plan, Goodrich did not retain the right to modify or discontinue the welfare benefits offered. The welfare plans provided that employees who retire and are eligible for a pension would be eligible for coverage. (*Id.* at 20a n.2).

After the enactment of ERISA in 1977, and in improved plans in 1981 and 1983, Goodrich published a portfolio of plans containing summary plan descriptions ("SPDs") describing eligibility for the welfare benefit programs.[1] These plans stated

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1. There were no formal plans, only the SPDs describing the programs.

that a retiree who was eligible for a pension would receive medical and life insurance benefits as described in the plans. For example, the 1977 and 1981 Major Medical Plans described eligibility as follows: "If you retire and are eligible for a pension, you shall receive the Major Medical coverage as modified below." (R. 85, Apx. 1103, 1131). The 1977 and 1981 Hospitalization Plans provided:

> If you retire and are eligible for a pension, you shall continue to have this same health coverage. Your dependents named at the time you retire also will be covered.
>
> If you should die after you retire, your surviving spouse will continue to be covered for these benefits until his or her death or remarriage. Other dependents will continue to be covered as long as they are eligible.

(*Id.* at 1114-1115, 1141). The 1977 and 1981 Life Insurance Plans provided: "When you retire, you will continue to receive a portion of your Life Insurance. . . ." (*Id.* at 1123, 1152).

In 1983, Goodrich established separate Retiree Health Care & Prescription Drug Plans, which set out a retiree's eligibility for coverage in the following language:

> If you retire and are eligible for a pension, you shall have the Retiree Health Care Plan — effective on your retirement date. Your dependents named at the time you retire also will be covered.
>
> If you should die after you retire, your surviving spouse will continue to be covered for these benefits until his or her death or remarriage. Other

> dependents will continue to be covered as long as they are eligible.

(*Id.* at 1167).

None of the post-ERISA SPDs contained a clause reserving a right to amend, suspend, or terminate benefits or authorizing a substitution of benefit sponsors or providers. (App. B at 45a-46a).

D. In 1986, Goodrich Forms a Joint Venture With Uniroyal Tire Company to Create a New Entity, Uniroyal Goodrich Tire Company.

In January 1986, Goodrich and Uniroyal agreed to jointly divest themselves of their respective tire businesses and form a new company, UGTC, to be owned equally. The assets and liabilities of each company's tire business including liability for payment of pension and welfare benefits for employees and retirees would be transferred to the new entity. (*Id.* at 23a).

In divesting its tire business, Goodrich split its one pension plan covering all of its employees and retirees into four distinct and separate plans, Salary Tire, Wage Tire, Salary Non-Tire, and Wage Non-Tire, based on ERISA § 4044. (App. A at 5a). Goodrich selected those retirees that should be listed in one of the four plans. Those retirees who had retired from the tire division were assigned to either a salary or wage tire pension plan. Sufficient trust funds to cover each retiree's pension liability were allocated to one of the four pension plans. The tire plans with the trust funds were ultimately transferred to UGTC.

Significantly, the life insurance, major medical, hospitalization, health care, and prescription drug plans were

not transferred to UGTC. Instead, Goodrich and Uniroyal provided in a joint venture agreement that UGTC would establish comparable welfare plans to those of Goodrich and Uniroyal and would

> assume all liability of Goodrich and Uniroyal for benefits under their present or past welfare plans or those of their predecessors for active, former and retired employees of the Goodrich Tire Business or the Uniroyal Tire Business.

(App. B at 23a). Goodrich, pursuant to the joint venture agreement, entered into an Assumption of Liabilities and Indemnification Agreement with UGTC. The agreement provided that UGTC would pay and assume liability for any liability associated with Goodrich retirees who were transferred to the UGTC retirement rolls. (R. 74, Apx. 924-925).

E. The Corporate Retirees Are Transferred to the UGTC Retirement Rolls Using Social Security Numbers as a Method of Selection.

In March 1986, Goodrich's Controller Division decided to transfer the liabilities for a certain portion of the Corporate Division's retirees to UGTC under ERISA § 4044. (R. 74, Apx. 838). To determine the number of Corporate retirees who were to be transferred, Controller Division analyzed that 42.54% of Goodrich's total business had been devoted to tires. (App. B at 25a). Accordingly, Goodrich, without informing the retirees or seeking their consent, decided to transfer 42.54% of its Corporate retirees to UGTC. (*Id.* at 25a-26a). As a method of selecting who would be transferred, Controller Division decided to use Social Security numbers. In all, there were 1,024 corporate salaried retirees. From this pool Goodrich unilaterally assigned all Corporate retirees whose Social Security numbers

ended in 4254 or lower, 420 in number, to the Salaried Tire Pension Plan. Those retirees whose Social Security numbers ended in 4255 or higher remained with Goodrich. The transferred retirees were informed by human resources that the new company would assume their pension, medical and life insurance benefits obligations. (*Id.* at 26a).

Petitioner Gottschalk, in a letter to human resources, strenuously objected to his transfer to UGTC. He stated that there had been one Goodrich retirement plan and benefit plan for all salaried retired employees, that they should be covered by the plan "under which they retired," and that he had never worked for the Tire Division. (R. 54, Apx. 242-243). Sengpiel, Kelly and other retirees also protested the transfer.

F. Goodrich Sells Its Interest in UGTC.

In December 1987, Goodrich sold its interest in UGTC to a private investment firm. (App. B at 27a). Gottschalk, concerned that he and the other retirees would sustain a loss of benefits, telephoned and later wrote to Goodrich's chief executive officer, John Ong. Gottschalk maintained that while Goodrich could arrange for an agent to pay its benefits, it could not shift the legal liability to a person with no financial ability to pay. He asked that Goodrich change its position that UGTC was solely responsible for his retirement benefits and to again assume his and the other transferred retirees' benefits. (R. 66, Apx. 568).

Mr. Ong responded to Gottschalk by a letter[2] stating that while UGTC was primarily responsible for retiree benefits, he was confident that UGTC would continue to discharge its

2. The full text of Mr. Ong's letter is appended to the Memorandum Opinion of the district court. (App. B at 62a-65a).

obligation to the retirees. Mr. Ong then assured Gottschalk that he could "look to Goodrich to satisfy the rights you enjoy pursuant to the retiree medical benefits plan" and that

> [N]othing in the assumption of liability by UGTC is intended to diminish such rights as you may have under those plans or to prevent you from looking to Goodrich to honor them if UGTC fails to do so.

As a result of Mr. Ong's letter, Gottschalk did not institute a class action in 1988 to be restored to the Goodrich retirement rolls. (App. B at 28a). Similar assurance letters were written to other retirees.

G. In 1995, UGTC Reduces Retiree Welfare Benefits and Merges Into Michelin North America, Inc.

In 1995, UGTC substantially decreased life insurance benefits and reduced retiree health and welfare benefits by raising deductibles and co-payment maximums and imposing other changes in connection with Medicare coverage.[3] (App. B at 29a; App. A at 7a). Petitioners and other transferred retirees requested UGTC/Michelin and Goodrich to restore them to the Goodrich retirement rolls so that they would receive the same benefits that Goodrich was providing to the untransferred

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3. Specifically, UGTC made the following changes: (1) the life insurance benefit was reduced from $25,000 to $5,000; (2) the reimbursement for cost of Medicare premium was discontinued; (3) the monthly costs of $10 per individual and $40 per family were imposed for medical and prescription drug coverage; (4) the annual deductible was increased from $100 to $150 for individuals and from $200 to $300 for families; (5) the annual co-payment maximum was increased from $450 per individual and $550 per family to $1,000 regardless of number of individuals covered; and (6) coordination of Medicare benefits was changed to presume coverage.

Corporate retirees. UGTC/Michelin and Goodrich, however, refused to restore the transferred retirees to the Goodrich retirement rolls. In that same year, UGTC was merged into Michelin. (R. 50, Apx. 151 n.3).

H. Petitioners File This ERISA Action Against Goodrich, Its Benefit Plans, UGTC, Its Benefit Plans, and Michelin.

When petitioners realized that they would not be restored to the Goodrich retirement rolls, they brought a Fed. R. Civ. P. 23 class action against Goodrich, the Goodrich Plans, UGTC, the UGTC Plans, and Michelin in the Northern District of Ohio, Eastern Division, under ERISA §§ 502(a)(1)(B) and (a)(3). (App. B at 30a-31a). They alleged that Goodrich had breached its fiduciary duty under ERISA by arbitrarily and unilaterally transferring them to the retirement rolls of UGTC and that Goodrich and its plans were still primarily liable to them for their retirement benefits. They sought the following relief: (1) a judgment ordering Goodrich to "reassume and be responsible to" petitioners for their welfare benefits; (2) a judgment ordering Goodrich to pay the additional costs incurred by petitioners due to the 1995 decreases in benefits by UGTC; (3) a judgment ordering UGTC/Michelin to transfer the petitioners back to the retirement rolls of Goodrich; and (4) other appropriate equitable relief and attorney fees. (*Ibid.*)

Respondents moved for summary judgment claiming, *inter alia*, that the retirees' benefits were not vested and that Goodrich had not acted as a fiduciary when it transferred the retirees to UGTC.

In opposing summary judgment, petitioners on their breach of fiduciary duty claim relied on the ruling in the Eighth Circuit in *Howe v. Varity*, 36 F.3d 746, 756 (8th Cir. 1994), *aff'd on*

other grounds, 516 U.S. 489 (1996). The Eighth Circuit held that it was a breach of fiduciary duty to "transfer" ten retirees who had retired before the creation of their former employer's successor in interest without the retirees' knowledge and consent and that their former employer could not unilaterally relieve itself of welfare obligations to its retirees by transferring them.

On their contract-based benefit claims, petitioners relied principally on *In re White Farm Equipment Co.*, 788 F.2d 1186, 1193 (6th Cir. 1986) ("the parties may themselves set out by agreement or by private design, as set out in plan documents, whether retiree welfare benefits vest, or whether they may be terminated").

Petitioners' theory of the case, expressed in briefs and oral argument, was that: (1) although Goodrich could delegate the payment of retirees' welfare benefits to UGTC, it could not extinguish its primary liability to its retirees without their assenting to a novation; (2) ERISA did not provide for or permit the transfer of welfare plan liability, as distinguished from funded pension plan liability which can be transferred under ERISA § 208; (3) Goodrich in transferring the retirees had acted as a fiduciary under ERISA §§ 4044 and 3(21)(A) because it exercised discretion in the management of the plan and the disposition of its assets when it selected participants and beneficiaries and allocated funds to assign and transfer to the respective pension plans; (4) Goodrich had breached its fiduciary duty by unilaterally transferring Corporate retirees to the Tire Pension Plan because the transfer was not solely in the retirees' interest; (5) Goodrich's use of Social Security numbers was arbitrary, capricious, and discriminatory; (6) Goodrich had not granted UGTC the power to change the benefits for Goodrich retirees; (7) Goodrich was equitably estopped to deny that its benefits were vested; and

(8) reasonable minds could differ as to whether Goodrich intended to vest retirees' welfare benefits. (*Id.* at 30a-31a).

I. The District Court Grants Summary Judgment to Respondents.

In granting summary judgment to respondents, the district court held that Goodrich did not breach any fiduciary duty under ERISA because the transfer was not a fiduciary act. (*Id.* at 35a-43a). The court held that the transfer was more like a corporate business decision, which had a collateral effect on prospective, contingent employee benefits, than to the management or administration of the plan. (*Id.* at 38a). The court distinguished this Sengpiel case from *Howe v. Varity*, *supra*, by finding that "bad faith" was an element of the breach of fiduciary duty claim in *Howe*. *Howe*, the court held, was not controlling in the Sixth Circuit and was "an anomaly, contrary to the wave of other case law on the extent of fiduciary responsibilities under ERISA." (*Id.* at 43a n.12).

On petitioners' contract-based claim the court held that petitioners could be successful only if their benefits vested at retirement at the level of coverage they were now claiming. (*Id.* at 43a-44a). Even in the absence of a reservation of rights clause, the court found that petitioners had not proved a clear and affirmative commitment by Goodrich to provide benefits for life and that such words as: "Employees who retire and who are eligible for a pension will be eligible for coverage," did not promise lifetime benefits. (*Id.* at 47a-48a). The court also held that the retirees could not "bootstrap themselves into a lifetime of vested benefits because of language referring to coverage for spouses in the event that they predecease the spouse." (*Id.* at 48a n.15). Therefore, the court concluded Goodrich was not "obligated" to pay retiree welfare benefits — the benefits were essentially gratuitous and could be terminated at any time.

J. The Sixth Circuit Affirms.

On appeal, petitioners raised the same issues that they had raised below.[4] The Sixth Circuit, in affirming, held that the selection of the affected retirees, and their subsequent assignment to the transferred plans, although involving the exercise of a degree of discretion, was simply the "ministerial application of a percentage classification to implement its business decision" not amounting to an exercise of discretion under ERISA's fiduciary standards. (App. A at 11a). Although conceding that the Eighth Circuit in *Howe* had held, as to the individual retirees, that the transfer of benefits to a successor without the knowledge or consent of the retirees was a breach of fiduciary duty, the Sixth Circuit concluded that the Eight Circuit's holding should be limited to the unique and egregious facts of that case. (*Id.* at 15a n.8).

The Sixth Circuit also agreed with the district court that the retirees' welfare benefits were not vested. Citing *Sprague, et al. v. General Motors Corp.*, 133 F.3d 388, 400 (6th Cir.) (*en banc*), *cert. denied*, __ U.S. __, 118 S. Ct. 2312 (1998), the court held that the "intent to vest [welfare benefits] 'must be found in the plan documents and must be stated in clear and express language' " and that the plan documents did not clearly express an intent to guarantee lifetime benefits or create "an ambiguity as to whether such benefits are vested." (*Id.* at 13a-14a).

Referring to the language in the Goodrich plans, the court concluded:

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4. The Court of Appeals ruled that petitioners had not raised their equitable/promissory estoppel argument in the Court of Appeals. (App. A at 6a n.2). On the contrary, equitable and promissory estoppel was argued in detail in appellants' brief. (Appellants' Brief at 32-37).

> While this language may imply generally that benefits are to continue at the same rate provided to the retiree at his or her death, it falls far short of expressing a clear intent to render such benefits "forever unalterable."

(*Id.* at 14a).

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION OF THE SIXTH CIRCUIT IS IN CONFLICT WITH THE DECISION IN THE EIGHTH CIRCUIT IN *HOWE v. VARITY CORP.*, 36 F.3d 746, 756 (8TH CIR. 1994), ON TWO IMPORTANT ISSUES POTENTIALLY AFFECTING ALL RETIREES OF PRIVATE COMPANIES:

(1) WHETHER AN EMPLOYER ACTS AS A FIDUCIARY UNDER ERISA WHEN IT TRANSFERS ITS OBLIGATIONS TO PROVIDE PENSION AND WELFARE BENEFITS TO A SUCCESSOR IN INTEREST? AND

(2) ASSUMING THE EMPLOYER ACTS IN A FIDUCIARY CAPACITY, WHETHER IT BREACHES ITS FIDUCIARY DUTY BY TRANSFERRING A PERCENTAGE OF A CLASS OF SIMILARLY SITUATED RETIREES TO THE SUCCESSOR'S WELFARE ROLLS WITHOUT THE RETIREES' CONSENT?

The petition for writ of certiorari should be granted because the Sixth Circuit's decision is in irreconcilable conflict with

the Eighth Circuit's decision in *Howe v. Varity*, 36 F.3d 746, 756 (8th Cir. 1994), *aff'd on other grounds*, 516 U.S. 489 (1996).

The facts of this case and the facts in *Howe*, as to the employees who had already retired at the time of the creation of the successor company, are identical. In *Howe*, Varity Corporation, which owned Massey-Ferguson, Inc., formed Massey Combine Corporations to divest Massey-Ferguson of its unprofitable combine and tractor business. Varity and Massey-Ferguson deceitfully persuaded some active employees to transfer to Massey Combine. Varity and Massey-Ferguson also transferred some employees who had already retired before the creation of Massey Combine to the successor's retirement rolls without their consent. No fraud was practiced on the transferred retirees. Ten of the retirees became individual (non-class) plaintiffs.

In this Sengpiel case, Goodrich formed a joint venture with Uniroyal to divest itself of its tire business by creating a successor tire company, UGTC. As in *Howe*, employees who had already retired from Goodrich, petitioners, were "transferred" to UGTC. Their consent to the transfer was not sought or obtained. That part of the decision in *Howe* that applies to this case deals only with the ten individual retirees whose situation is identical; namely, those who had already retired at the time of the creation of Massey Combine and were involuntarily transferred to the Massey Combine plans.[5] As to the transferred retirees, the *Howe* court held:

> They were given no explanation, they were not asked for permission, and they were not even informed of

5. This Court did not review the "holding that Varity breached a fiduciary duty with respect to the Massey-Ferguson retirees whose benefit obligations had been involuntarily assigned to Massey Combines." (App. A at 15a n.8). *Varity Corp. v. Howe*, 516 U.S. 489, 496 (1996).

> the "transfer" until MCC went into receivership. Such a complete disregard of the rights and interests of beneficiaries is a clear breach of fiduciary duty in violation of Section 1104(a)(1), and the named individual plaintiffs have a right of action for redress under Section 1132(a)(3). An obligor cannot free itself of contractually created duties without the consent of the persons to whom it is obligated. *Restatement (2d) of Contracts*, Section 318(3), comment d. M-F and Varity cannot unilaterally relieve themselves of obligations to the individual retirees. Their attempt to do so is of no legal effect, and we uphold the District Court's ruling in favor of the ten named individual plaintiffs.

36 F.3d at 756.

The element of deceit and misrepresentation, which was the basis of the Eighth Circuit's opinion as to the active employees who voluntarily transferred to Massey Combine, did not apply to the employees who had already retired. No fraud was practiced on them. They were simply assigned to the new company. The Sixth Circuit misread *Howe*. As to the retirees, there are no "unique and egregious facts." (App. A at 8a).

A. An Employer Acts as a Fiduciary When It Transfers Its Obligation to Provide Retiree Welfare Benefits to a Successor in Interest.

The court below, agreeing with the district court, held that the "transfer" of the retirees' welfare benefits was a business decision not implicating ERISA. (App. A at 9a). We agree that Goodrich's decision to divest its tire business is a business decision not subject to ERISA's fiduciary standards. But the selection and allocation process is more than a "formulaic

method of dividing its welfare plans and assigning employees to those plans in order to facilitate its spinoff transaction." Before Goodrich could split its four pension plans into one plan, it, as administrator, had to terminate its existing one plan covering all of its participants. Under ERISA § 4044,[6] the splitting of one pension plan into four plans, the selection of those participants who will be assigned to each plan, and the allocation of funds is a congressionally defined fiduciary function. An "administrator," defined in ERISA § 3(16)(A), is a fiduciary.[7] Selecting participants and allocating assets thus involves the exercise of "discretionary authority" or "discretionary responsibility," which are clearly fiduciary functions as defined by ERISA § 3(21)(A). *Cf. Bigger v. American Commercial Lines*, 862 F.2d 1341 (8th Cir. 1988).

The Sixth Circuit concedes that Goodrich in transferring retirees "may well have exercised some degree of decision making," but held, citing no authority:

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6. ERISA § 4044(a), provides, in part:

> In the case of the termination of a single-employer defined benefit plan, the plan *administrator* shall allocate the assets of the plan (available to provide benefits) among the participants and beneficiaries of the plan in the following order: . . .

(Emphasis added).

7. ERISA § 3(14)(A) defines a "fiduciary" under the term "party in interest":

> The Term "party in interest" means, as to an employee benefit plan —
>
> (A) any fiduciary (including, but not limited to, any administrator, officer, trustee, or custodian), counsel, or employee of such employee benefit plan;

> [T]he statute and case law make clear that only discretionary acts of plan management or administration, or those acts designed to carry out the very purposes of the plan, are subject to ERISA's fiduciary duties.

(*Id.* at 11a). The Sixth Circuit's holding is simply wrong. Congress defined plan termination, the selection of participants, and the allocation of assets as fiduciary functions. Therefore, Goodrich acted as a fiduciary as a matter of law when it split its one plan, allocated assets, and assigned the petitioners and other participants to the proper plan.

B. The Employer Breaches Its Fiduciary Duty in Transferring a Percentage of a Similarly Situated Class of Employees Who Had Already Retired to the Retirement Rolls of Its Successor in Interest Without the Retirees' Consent.

ERISA § 404(a)(1) provides that

> a fiduciary shall discharge his duties with respect to a plan solely in the interests of the participants and beneficiaries . . . for the exclusive purpose of providing benefits . . . with the care, skill, prudence and diligence

that a prudent man would use. This provision has been interpreted to impose an

> unwaivering duty on an ERISA trustee to make decisions with single minded devotion to a plan's participants and beneficiaries and, in so doing to act as a prudent person would act in a similar situation.

Adams v. Avondale Indus., Inc., 905 F.2d 943, 946 (6th Cir. 1990), *cert. denied*, 498 U.S. 984 (1990) (quoting *Morse v. Stanley*, 732 F.2d 1139, 1145 (2d Cir. 1984)).

As the *Howe* court held, transferring employees who had already retired without explanation and without asking for permission shows a complete disregard of their rights and interests and violates ERISA § 404(a)(1). A fiduciary must act "solely in the interests of the participants and beneficiaries." The transfer of the Corporate Group retirees was not intended to and did not benefit them; it was intended to benefit and did benefit Goodrich in divesting itself of its tire business. UGTC's agreement to establish comparable plans does not show good faith. This agreement was simply an integral part of Goodrich's attempt to shift its liability to its successor in interest.[8]

The transfer of a percentage of the Corporate Group retirees is also a breach of fiduciary duty. One thousand and twenty-four corporate retirees were placed in a pool. Petitioners and the class they represent, those whose social security numbers were 4254 or lower, were arbitrarily transferred to UGTC. This arbitrary assignment discriminated against those retirees whose ending Social Security numbers were lower than those numbers were higher. Some Corporate retirees were treated differently than other Corporate retirees. There is no provision in ERISA which authorizes disparate treatment of some similarly situated participants versus other similarly situated participants. In *Winpisinger v. Aurora Corp.*, 456 F. Supp. 559, 566, 573 (N.D. Ohio 1978), the court stated:

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8. UGTC agreed to indemnify Goodrich for any loss sustained by Goodrich due to UGTC's failure to pay benefits. This agreement was the subject of a cross-claim by Goodrich against UGTC/Michelin. (App. B at 31a).

> [T]he fiduciary is forbidden from granting preference as between a plan's participants or as between a plan's beneficiaries . . . [he or she] owe[s] a duty of fairness to all — not just some of the covered employees. . . . [Fiduciaries are therefore] required to exercise their discretion in a non-discriminatory manner.

A fair method would have been to transfer 42.54% of all Corporate Group retirees' obligations to UGTC and for Goodrich to retain 57.46% of the group's obligations.

The Sixth Circuit again erred in holding that there was no evidence that Goodrich did not breach its fiduciary duty because the retirees' welfare benefits were not "vested." (App. A at 12a). In *Howe*, the retirees' benefits were not vested because the employer had expressly reserved the right to terminate or amend the plan. *Howe v. Varity Corp.*, 896 F.2d 1107, 1108-10 (8th Cir. 1990) (Howe I). In this Sengpiel case, there is no reservation of a right to terminate or amend the plan. The transferred retirees' rights in this case are far stronger than were the transferred retirees' rights in *Howe*.

The Eighth Circuit also held that the employer could not "free itself of contractually created duties without the consent of the persons to whom it is obligated." *Howe*, 36 F.3d at 756. The contractually created duty is the duty of the employer to *provide and sponsor* welfare benefit plans for its former employees.

The Sixth Circuit held that Goodrich did not improperly delegate its duty to pay the retirees' welfare benefits to UGTC because the benefits were never vested. (*Id.* at 15a). It is hornbook law that while an obligor can properly delegate the performance of his duty to another (unless contrary to public

policy or the terms of the promise), the delegation of performance does not discharge the duty or liability of the delegating obligor. *Restatement (Second) of Contracts* § 318 (1981), comment d, Delegation and Novation. "The performance required by a duty can often be delegated; but by such a delegation the duty itself is not escaped." 4 *Corbin on Contracts* § 866, 452 (1951). If this were so, an obligor could free itself of its obligations by the simple expedient of assigning them. ERISA did not repeal the common law. *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 24 n.26 (1983). The assumption by UGTC of Goodrich's obligation to provide welfare benefits simply gave the retirees a new and additional security for Goodrich's promise to provide benefits. *Corbin*, *supra*, at 453.

One reason for the rule prohibiting the assignment of duties is that one has the right to know "to whom he must look for the satisfaction of his rights" and is entitled to the benefit of the "character, credit and substance" of the person with whom he has contracted. *Crane Ice Cream Co v. Terminal Freezing & Heating Co.*, 147 Md. 588, 598, 128 A. 280, 283 (1925). The retirees looked to Goodrich during their working careers, not to some unborn entity, for their retirement benefits. Unlike active tire division employees, who could choose whether to transfer to the new entity, or find other employment, the retirees were simply shifted over to the new entity without their assent. Further, their transfer was made over their vigorous objection.

Lastly, there was no provision in the plans for the substitution of a successor company as the sponsor of the welfare benefits. *Cf. Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73 (1995).

Because the issue presented by this case potentially affects all retirees of private companies, the Court should grant the petition for certiorari.

II.

THE PETITION SHOULD ALSO BE GRANTED BECAUSE THE HOLDING OF THE SIXTH CIRCUIT IS IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS ON THE QUESTION OF WHETHER, IN THE ABSENCE OF A RESERVATION OF RIGHTS CLAUSE, TO PROVE THE VESTING OF WELFARE BENEFITS, THE EMPLOYEE MUST SHOW CLEARLY AND AFFIRMATIVELY THROUGH THE PLAN LANGUAGE THAT THE EMPLOYER INTENDED TO GUARANTEE THE EMPLOYEES' BENEFITS FOR LIFE.

The Sixth Circuit held that the "intent to vest [welfare benefits] 'must be found in the plan documents and must be stated in clear and express language.' " (quoting *Wise v. El Paso Natural Gas Co.*, 986 F.2d 929, 937 (5th Cir. 1993)).[9] (*Id.* at 12a-13a). Despite the absence of a reservation of rights clause, the Sixth Circuit then found that the language in Goodrich's plans did not show an intent to "guarantee" lifetime benefits or create an ambiguity as to whether the benefits were vested. (*Id.* at 14a). This holding is in conflict with decisions in other circuits.

The almost irrebuttable presumption against "vesting" employed by the Sixth Circuit is contrary to the law of other circuits. This nation's retirees believe that their retirement benefits are to last "for life." *E.g., United Steelworkers v. Textron, Inc.*, 836 F.2d 6, 9 (1st Cir. 1987) (language stating only that retiree medical benefits "shall be provided" was consistent with benefits lasting for lifetime: "If retirement lasts at all it lasts a lifetime."); *Keffer v. H. K. Porter Co.*, 872 F.2d 60, 64 (4th Cir. 1989) (recognizing the "far-reaching understanding of the context in which retiree benefits arise:

9. *Wise* contained an unambiguous reservation of rights clause.

[they] are typically understood as a form of delayed compensation or reward for past services . . ."). Consistent with this commonly held assumption, the Goodrich retiree medical and life insurance benefits at issue in this case were part of the retirement program for the retiree's family and, accordingly, the Sixth Circuit should have held that the benefits were "vested" and were to last until the death of the retiree or if the retiree's spouse survives, until the death or remarriage of the spouse.

Whether welfare benefits are vested is a question of contractual interpretation. *United Paperworkers International Union v. Champion International Corp.*, 908 F.2d 1252, 1256 (5th Cir. 1990). Although welfare plans are specifically exempted from vesting requirements to which pension plans are subject, ERISA § 201(1), employers may vest welfare benefits if they choose to do so. *In re White Farm Equipment Co.*, 788 F.2d 1186, 1193 (6th Cir. 1986).

The court below held, however, that as a matter of law, despite the absence of a reservation of rights clause, the language in Goodrich's plans did not show "clearly and affirmatively" an intent to vest benefits. The Goodrich plans promised the employees that on retirement if "you are eligible for a pension, you will continue to receive this same [hospitalization or major medical] coverage." (App. B at 48a). The plans also promised that "if you should die after you retire, your surviving spouse will continue to be covered . . . until his or her death or remarriage." (*Ibid.*) This is a direct promise of lifetime benefits. How could a surviving spouse be entitled to lifetime benefits unless the deceased spouse had also had lifetime benefits? To be a "surviving spouse" the other spouse must have died.

Despite this language, the Sixth Circuit did not grant summary judgment for the petitioners (as courts have done in

cases such as *Keffer v. H. K. Porter Co.*, *supra*) nor did it find the documents ambiguous and remand for trial (as courts have done in cases such as *Bower v. Bunker Hill Co.*, 725 F.2d 1221, 1223-24 (9th Cir. 1994)). Instead the court below found that summary judgment for Goodrich was appropriate. This, in essence, means that the Goodrich retiree welfare benefits were deemed to be "gratuitous" and could be terminated, in whole or in part, at any time. *E.g., Diehl v. Twin Disc*, 102 F.3d 301, 305-06 (7th Cir. 1996) (stating court forced to decide the question of whether continuation of retiree benefits was "a mere gratuity, the result of the company's beneficence."). This holding was made despite the court's acknowledgment that the plan language "may imply generally" that the benefits were to continue until death. (App. A at 14a).

Other circuits disagree in interpreting plans containing almost identical language. In *International Association of Machinists and Aerospace Workers v. Masonite*, 122 F.3d 228, 232 (5th Cir. 1997), the court, despite a reservation of rights clause, held the following language ambiguous: "Employees retiring at age 62 . . . will be entitled to medical [coverage] for themselves and their covered dependents until the death of the retired employee." Similarly, in *Bower v. Bunker Hill Co.*, *supra*, 725 F.2d at 1223-24, the plan language keyed medical coverage to "receiving a pension from the Bunker Hill Company"; the court held the language ambiguous, precluding summary judgment. In *Alexander v. Prime America Holdings, Inc.*, 967 F.2d 90, 91-92 (3d Cir. 1992), the court held that, even with a reservation of rights clause, language stating:

> Upon retirement, salaried employees and their spouses will receive the Plans basic medical coverage and that the death of retiree does not affect the spouse's rights to benefits

created a question of fact to be resolved by the trial court. In *Jensen v. Sipco, Inc.*, 38 F.3d 945, 950 (8th Cir. 1994), *cert. denied*, 514 U.S. 1050 (1995), the court held that salaried retirees medical benefits were vested with plan language reading: "benefits *will be* provided until the retiree dies, or spouse divorces, or a child marries or reaches age 19," even though the employer had reserved a right of amendment. (Emphasis in original). *See also Barker v. Ceridian*, 122 F.3d 628, 634-38 (8th Cir. 1997); and *Stewart v. KHD Deutz of America Corp.*, 980 F.2d 698, 703-04 (11th Cir. 1993). *See* generally Payne, W.T., "Lawsuits Challenging Termination or Modification of Retiree Welfare Benefits," 10 *The Labor Lawyer* 91 (Winter, 1994).

The rule of law applied by the Sixth Circuit in this case leaves plan participants worse off than they would have been had ERISA never been enacted. Pre-ERISA Ohio state court decisions held that under our present economic system after the employee has complied with all of the conditions entitling him to the retirement rights, the benefits become vested. *Cantor v. Berkshire Life Ins. Co.*, 171 Ohio St. 405, 171 N.E. 2d 518 (1960); *Luli v. Sun Products Corp.*, 60 Ohio St. 2d 144, 398 N.E. 2d 553 (1979). ERISA was enacted to "promote the interests of employees and their beneficiaries in employee benefit plans" (*Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 90 (1983)), not to hinder them. These considerations led this Court in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 112-114 (1989), to instruct that claims for promised benefits be reviewed by a court "as it would have reviewed any other contract claim — by looking to terms of the plan and other manifestations of the parties' intent," and to reject an interpretation of ERISA's enforcement provisions that "would afford less protection to [participants] than they enjoyed before ERISA was enacted."

The Sixth Circuit placed a heavy burden on petitioners. Simply because Congress did not mandate a statutory vesting

of welfare benefits should not force the employee to prove that the employer intended to "guarantee" "forever unalterable" benefits by clear and convincing evidence. There should be no presumption against vesting. Normal rules of contract interpretation should apply. At best for respondents, Goodrich's plan language is ambiguous precluding summary judgment and the case should have been remanded to the trial court for a trial on that issue.

Because the court of appeals' decision is in conflict with the decisions in other circuits and placed an almost impossible burden on the retired employees to prove vesting, even in the absence of a reservation of rights provision, this petition for certiorari should be granted on this important issue.

CONCLUSION

Congress enacted ERISA to bring a measure of uniformity in an area where the decisions under the same set of facts may differ from state to state. Not surprisingly, circuits now differ on the same set of facts. This case affords the Court the opportunity to definitively decide what language in employee benefit plans show an intent by the employer to vest welfare benefits. The case also affords an opportunity for the Court to decide whether transferring employees who had already retired to a successor corporation constitutes a fiduciary act subject to ERISA's fiduciary standards and what amounts to a breach of that duty.

For these reasons, petitioners respectfully request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DECIDED AND FILED SEPTEMBER 18, 1998

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

GLEN H. SENGPIEL, DONALD E. KELLY, and DONALD R. GOTTSCHALK,
Plaintiffs-Appellants,

v.

THE B. F. GOODRICH COMPANY, THE B.F. GOODRICH PENSION PLAN, THE B.F. GOODRICH LIFE INSURANCE PLAN, THE B.F. GOODRICH HOSPITAL-SURGICAL MEDICAL BASIC PLAN, THE B.F. GOODRICH PRESCRIPTION DRUG BENEFIT PLAN, THE B.F. GOODRICH MAJOR MEDICAL PLAN, UNIROYAL GOODRICH TIRE COMPANY, UNIROYAL GOODRICH PENSION PLAN, THE UNIROYAL GOODRICH TIRE COMPANY HEALTH CARE PLAN, THE UNIROYAL GOODRICH TIRE COMPANY PRESCRIPTION DRUG PLAN,

No. 97-3832

Appendix A

THE UNIROYAL GOODRICH TIRE COMPANY LIFE INSURANCE PLAN, and MICHELIN NORTH AMERICA, INC.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Ohio at Akron.
No. 96-00316--David D. Dowd, Jr., District Judge.

Argued: July 29, 1998

Decided and Filed: September 18, 1998

Before: SUHRHEINRICH and DAUGHTREY, Circuit Judges; McKEAGUE, District Judge.*

COUNSEL

ARGUED: John L. Wolfe, Akron, Ohio, for Appellants. James A. Rydzel, JONES, DAY, REAVIS & POGUE, Cleveland, Ohio, John J. McGowan, Jr., BAKER & HOSTETLER, Cleveland, Ohio, for Appellees. **ON BRIEF:** John L. Wolfe, Akron, Ohio, for Appellants. James A. Rydzel, JONES, DAY, REAVIS & POGUE, Cleveland, Ohio, John J. McGowan, Jr , Ronald S. Okada, BAKER & HOSTETLER, Cleveland, Ohio, Theodore E. Laszlo, Jr.,

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* The Honorable David W. McKeague, United States District Judge for the Western District of Michigan, sitting by designation.

THE B.F. GOODRICH COMPANY, Richfield, Ohio, for Appellees.

OPINION

McKEAGUE, District Judge. This litigation arises out of a corporate transaction in which B.F. Goodrich ("BFG") spun off its tire division to a new company that it had formed as a joint-venture with the Uniroyal Tire Company ("Uniroyal"). As part of this spin-off transaction, BFG transferred its obligation to provide certain retirees' pension and welfare benefits to the new company. The principal issues on appeal are whether, in effecting this transfer, BFG violated its fiduciary duties under the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001, *et seq.* ("ERISA"), and whether the transferred retirees were denied benefits promised to them. The district court granted summary judgment in favor of defendants, finding that BFG did not act in a fiduciary capacity when it transferred the pension and welfare plan liabilities and that plaintiffs' contract-based ERISA claims failed because their welfare benefits did not vest at the time of their retirement. We affirm.

I.

Plaintiffs, Glen H. Sengpiel, Donald R. Gottschalk, and Donald E. Kelly, are retirees of defendant B.F. Goodrich. At the time of their retirement, each plaintiff worked in BFG's corporate department. Sengpiel retired in 1976 from his position as Corporate Director of Employee Relations; Gottschalk retired in 1981 from his position as Corporate Employee Relations Representative; and Kelly retired in 1982

from his position as a foreman in plant cleaning in one of BFG's facilities.[1]

In 1972, prior to ERISA's enactment, BFG distributed a binder to its employees entitled, "Design for Protection, B.F. Goodrich Salaried Benefit Program." The binder contained brochures describing five benefits programs: Hospitalization and Surgical, Pension, Life Insurance, Major Medical Insurance, and Prescription Drug. Only the major medical plan expressly reserved BFG's right to modify or discontinue the benefits offered.

In 1977, in conformance with the newly-enacted ERISA, BFG prepared the Company's first summary plan descriptions ("SPDs"), which it distributed to all salaried and wage employees in a portfolio. The first booklet in the portfolio, entitled "Highlights," summarized the benefits offered by BFG. The first paragraph of the Highlights booklet stated: "While the Company expects to continue these benefits indefinitely, it reserves the right at its option to change or discontinue any or all of the programs at any time." However, none of the individual SPDs in the portfolio contained a reservation of rights clause. Sengpiel had been retired a few months when the portfolio was distributed, but as Corporate Director of Employee Relations he was aware of the language in the Highlights booklet prior to his retirement. In 1981, BFG distributed revised SPDs and a new Highlights booklet containing the same reservation of rights clause. Again, none of the individual SPDs contained a reservation of rights provision. Gottschalk and Kelly retired in 1981 and 1982, respectively. In 1986, BFG sent an SPD for the Retiree Health Care Plan to all retirees, including plaintiffs, which contained the following clause: "The BFGoodrich Company

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[1]These plaintiffs were to become class representatives in the event that the district court certified this case as a class action. However, the district court elected to defer a decision on certification until after defendants' motions for summary judgment were decided and the issue subsequently became moot.

expects to continue the Health Care Plan indefinitely but reserves the right to amend, suspend or terminate the Plan at any time."

In January 1986, BFG and Uniroyal reached an agreement to spin off their respective tire operations into a joint venture to be called Uniroyal Goodrich Tire Company ("UGTC"). Under this plan, BFG and Uniroyal would own UGTC in equal parts and each company would transfer all the assets and liabilities of its tire business to the new company. The liabilities included the pension and welfare benefit obligations to tire-related retirees. To accomplish this transfer, BFG split its retirement program into four separate plans (Salaried Tire, Wage Tire, Salaried Non-Tire, and Wage Non-Tire). All retirees who had retired from a department associated with BFG's tire division were assigned to a Tire pension plan.

In addition to transferring liability for the pension and welfare benefits of retirees who worked in the tire division, BFG decided that it was necessary to transfer the benefits liabilities for a portion of the corporate staff's retirees. The corporate staff serviced many different divisions, including the tire division. BFG concluded that based on its records, it was impossible to determine which retirees had worked most closely with the tire division throughout the course of their careers. Accordingly, BFG decided to select randomly a percentage of the corporate retirees that would be approximately equivalent to the percentage of BFG's business that had been devoted to tires, which was 42.54 percent. BFG then devised a method of selecting these corporate retirees whereby those retirees with social security numbers ending in 4254 or lower were assigned to the Tire pension and welfare benefit plans that were then transferred to UGTC. Pursuant to ERISA requirements, BFG transferred funds sufficient to support its pension obligations to the transferred retirees. There being no similar ERISA requirement for welfare benefit obligations, however, BFG did not transfer any funds to UGTC for the transferred retirees' welfare benefits.

Appendix A

A provision in the joint-venture agreement between BFG and Uniroyal required UGTC to establish and adopt employee welfare benefit plans comparable to the plans offered by BFG and Uniroyal. The provision also specified that UGTC was to "assume all liability of Goodrich and Uniroyal for benefits under their present or past welfare plans or those of their predecessors for active, former and retired employees of the Goodrich Tire Business or the Uniroyal Tire Business."

Several of the retirees protested the transfer, including plaintiffs, both at the time the transaction was entered into and again in 1987 when BFG decided to sell its interest in UGTC to a private investment firm. Plaintiffs testified at their depositions that BFG's chief executive officer assured them that they would continue to be treated the same as retirees who remained under the BFG plan.[2]

In 1990, BFG amended its pension and welfare benefit plans for retirees by raising the deductible amount from $100 to $150. This increase was partially offset by a $40 increase in the retirees' monthly pension benefits. Plaintiffs were not impacted by these changes, however, because they had been transferred to the UGTC rolls as of 1986.

In 1995, UGTC reduced retiree health and life insurance benefits by raising deductibles and co-payment maximums, decreasing life insurance benefits, and imposing other

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[2]BFG's chief executive officer also responded by letter to plaintiff Gottschalk and other retirees who complained about the transfer in 1987. This letter suggested that while UGTC was legally responsible for the retirees' benefits, the retirees could look to BFG to satisfy their rights if UGTC failed to provide them. The letter also stated explicitly, however, that it did not alter or expand those rights and that it did not waive the right to amend the welfare plans. The district court opinion discussed the implications of this letter at length. We do not address them here because the letter is relevant only to plaintiffs' equitable estoppel claims, which were not raised by plaintiffs on appeal, or to toll the statute of limitations, which the Court need not address in light of our holding affirming the district court's award of summary judgment to defendants on the merits.

changes in connection with Medicare coverage.[3] Also in 1995, UGTC was merged into Michelin North America, Inc. ("Michelin").

Plaintiffs do not challenge UGTC's right to reduce their benefits, as the UGTC plans (now sponsored and maintained by Michelin) have always expressly reserved the employer's right to amend the benefit plans. Rather, plaintiffs claim that defendants violated ERISA in transferring responsibility to pay their benefits to UGTC in the first instance.

II.

We review the district court's grant of summary judgment de novo. *See, e.g., Walbro Corp. v. Amerisure Cos.*, 133 F.3d 961, 966 (6th Cir. 1998). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

Plaintiffs brought numerous claims before the district court stemming from the reduction of their welfare benefits.[4] On

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[3]Specifically, UGTC made the following changes: (1) reimbursement for cost of Medicare premium discontinued; (2) monthly costs of $10 per individual and $40 per family imposed for medical and prescription drug coverage; (3) annual deductible increased from $100 to $150 for individuals and from $200 to $300 for families; (4) annual co-payment maximum increased from $450 per individual and $550 per family to $1000 regardless of number of individuals covered; (5) coordination of Medicare benefits changed to presume coverage; and (6) life insurance benefit reduced from $25,000 to $5,000.

[4]The district court noted that plaintiffs occasionally couched their complaint in terms of both pension and welfare benefits but that there was no real controversy regarding the pension plans. Plaintiffs have also suggested in various places throughout their appellate briefs that the transfer of their pension plans to UGTC was unlawful. As noted by the

appeal, however, plaintiffs raise only two arguments. First, plaintiffs argue that the district court erred in finding that BFG did not violate its fiduciary duties under ERISA. Second, plaintiffs challenge the district court's conclusion that their contract-based ERISA claims failed as a matter of law because their welfare benefits were not vested at the time of their retirement. We address each of these arguments in turn.

A.

Plaintiffs argue that BFG violated its fiduciary duties under ERISA when it transferred the Tire welfare plan liabilities to UGTC without their consent. ERISA provides that a "fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries." 29 U.S.C. § 1104. The statute further specifies that a fiduciary's duties must be taken "for the exclusive purpose of...providing benefits to participants and their beneficiaries...." *Id.* "Courts have read this section to impose 'an unwavering duty on an ERISA trustee to make decisions with single-minded devotion to a plan's participants and beneficiaries and, in so doing, to act as a prudent person would act in a similar situation.'" *Adams v. Avondale Indus., Inc.*, 905 F.2d 943, 946 (6th Cir. 1990) (quoting *Morse v. Stanley*, 732 F.2d 1139, 1145 (2d Cir. 1984)). Courts have also recognized, however, that "a corporation's fiduciary duties under ERISA do not encompass all of its activities." *United Steelworkers of Amer. v. Cyclops Corp.*, 860 F.2d 189, 198 (6th Cir. 1988).

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district court, however, it is clear that BFG satisfied its obligations under ERISA in transferring the pension plan liabilities. Section 208 of ERISA specifies that a pension plan liability may only be transferred if sufficient assets are also transferred to ensure that the plans are protected. *See* 29 U.S.C. § 1058. This Court has previously held that ERISA does not impose a fiduciary obligation on employers to guarantee future non-vested pension benefits to retirees. *See Dougherty v. Chrysler Motor Corp.*, 840 F.2d 2, 4 (6th Cir. 1988). Accordingly, BFG did not violate its fiduciary duties under ERISA with respect to the transfer of the pension benefit obligations to UGTC.

An employer that also acts as a plan administrator is said to wear "two hats." *See, e.g., Akers v. Palmer*, 71 F.3d 226, 231 (6th Cir. 1995). Only when the employer acts in its fiduciary capacity must it comply with ERISA's fiduciary duties. ERISA defines a plan "fiduciary" as one who "exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets" or who "has any discretionary authority or discretionary responsibility in the administration of such plan." 29 U.S.C. § 1002(21)(A). Accordingly, courts have typically distinguished between employer actions that constitute "managing" or "administering" a plan and those that are said to constitute merely "business decisions" that have an effect on an ERISA plan; the former are deemed "fiduciary acts" while the latter are not. It is firmly established, for example, that "a company does not act in a fiduciary capacity when deciding to amend or terminate a welfare benefits plan." *Sutter v. BASF Corp.*, 964 F.2d 556, 562 (6th Cir. 1992) (quoting *Adams v. Avondale Indus., Inc.*, 905 F.2d 943, 947 (6th Cir. 1990)); *see also Curtiss-Wright Corp. v. Schoonegongen*, 514 U.S. 73, 78 (1995) ("Employers or other plan sponsors are generally free under ERISA for any reason at any time, to adopt, modify, or terminate welfare plans.").

We agree with the district court that BFG's transfer of the retirees' welfare benefits is more analogous to amending, modifying, or terminating the then-existing welfare plans than to administering or managing them. In *Avondale*, an employer was deemed not to have acted in a fiduciary capacity when it amended its unwritten severance plan in conjunction with the sale of one of its divisions. *See Avondale*, 905 F.2d 943, 947 (6th Cir. 1990). In so holding, it was noted, "[i]n drawing the line between employer actions subject to the fiduciary duty requirement and those not, we must avoid any rule that would have the effect of undermining Congress' considered decision that welfare benefit plans not be subject to a vesting requirement." *Id.* Similarly, in holding that an employer did not act in a fiduciary capacity

when it merged two existing pension plans, a panel of this Court cautioned against judicial interference in such business decisions: "A company's reason for treating a class of beneficiaries differently is not always readily ascertainable. For this reason, a court should be hesitant to substitute its judgment for that of the company." *Sutter*, 965 F.2d at 562 (quoting *Moore v. Reynolds Metals Co. Retirement Program for Salaried Employees*, 740 F.2d 454, 456, n.3 (6th Cir. 1984)). BFG's decision to spin off its tire division and to transfer a share of its welfare benefit liabilities approximately equivalent to the portion of its business devoted to tires does not constitute discretionary plan administration according to the plan's terms or management of its assets.

Plaintiffs essentially concede that BFG's decision to spin off its tire division and its related decision to divide its welfare benefit plan into four smaller plans do not constitute fiduciary acts. They argue, however, that the company's selection of the affected retirees and their subsequent assignment to the transferred plans were discretionary acts of plan management or administration which are subject to ERISA's fiduciary standards. It is true that certain actions taken in the course of implementing a corporate business decision may be subject to ERISA's fiduciary standards even though the employer's decision itself is not. The Supreme Court has held, for example, that an employer acts in a fiduciary capacity when it intentionally misleads employees about the consequences of transferring their welfare benefit plans to a new entity created by a spin-off. *See Varity v. Howe*, 516 U.S. 489 (1996). Drawing from the law of trusts, the Court concluded that "[c]onveying information about the likely future of plan benefits, thereby permitting beneficiaries to make an informed choice about continued participation, would seem to be an exercise of a power 'appropriate' to carrying out an important plan purpose." *Id.* at 502. This Court recently acknowledged that an employer's explanation of benefits may be subject to ERISA's fiduciary standards. *See Sprague, et al. v. General Motors Corp.*, 133 F.3d 388,

However, the fact that an action taken by an employer to implement a business decision may ultimately affect the security of employees' welfare benefits does not automatically render the action subject to ERISA's fiduciary duties. To adopt such a rule would, in effect, erode the well-established principle that employers are free to make decisions that modify, amend, or even terminate their employees' unvested welfare benefits. An employer is said to act in a fiduciary capacity when it communicates with employees about their benefits because, in essence, the employer puts on its plan administrator hat and undertakes action designed to carry out an important purpose of the plan. Here, BFG chose a formulaic method of dividing its welfare plans and assigning employees to those plans in order to facilitate its spin-off transaction. In so doing, BFG may well have exercised some degree of discretionary decision-making. However, it is not the exercise of discretion alone that makes an employer's action subject to ERISA's fiduciary standards. Rather, the statute and case law make clear that only discretionary acts of plan management or administration, or those acts designed to carry out the very purposes of the plan, are subject to ERISA's fiduciary duties. BFG's ministerial application of a percentage classification to implement its business decision does not amount to an exercise of discretion of this character. The district court correctly found that the actions undertaken by BFG to implement its business decision were simply not the kind of plan management or administration that trigger ERISA's fiduciary duties. *See, e.g., Systems Council, EM-3 v. AT&T*, 972 F. Supp. 21, 32 (D.D.C. 1997) (holding that employer's "decisions to restructure itself and to spin-off its pension and welfare plans as part of the restructuring....and the actions necessary to implement them are not subject to ERISA's fiduciary standards"); *see also Blaw Knox Retirement Plan v. White Consol. Indus.*, 998 F.2d 1185, 1189 (3d Cir. 1993) (holding that an employer did not act in a fiduciary capacity in selling

its unprofitable divisions and structuring the transaction to include the existing pension plans).

Moreover, the district court also correctly concluded that even if it were assumed that BFG acted in a fiduciary capacity at some point in developing and implementing the spin-off transaction, plaintiffs have failed to establish that BFG breached its fiduciary duties. Although plaintiffs repeatedly assert that BFG's actions were taken "to benefit BFG" rather than the plan participants, plaintiffs point to no evidence that BFG benefitted at the participants' expense. In transferring the liabilities, BFG ensured that UGTC agreed to adopt welfare benefit plans comparable to its own. There is nothing in the record to suggest that BFG was motivated by bad faith or self-dealing considerations. Nor is there evidence that BFG's actions, when taken, were imprudent or manifestly adverse to plaintiffs' interests. Because welfare benefits are not vested, plaintiffs were in the same position after the transfer that they were in when the BFG plans still covered them. In fact, from 1990 until 1995, plaintiffs and their fellow transferred retirees were in better positions than their former colleagues still under the BFG plans. Michelin recently made a contribution to the retirees' pension fund that now makes their pensions fully-funded. Nothing in the record suggests that Michelin will ultimately be a less stable or secure sponsor of the retirees' benefit plans than BFG.[5] The record simply does not support a finding that BFG so abused its discretion in implementing the spin-off transaction as to

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[5] In addition, from a policy perspective, it would make little sense to adopt a rule requiring an employer to retain responsibility for paying all its employees' welfare benefits. As this Court has noted in the context of evaluating a similar rule urged upon us in the pension benefits context, such a rule would "have the ironic effect of encouraging companies to terminate plans rather than continue them in situations where employers transfer corporate assets." *Dougherty v. Chrysler Motors Corp.*, 840 F.2d 2, 4, n.2 (6th Cir. 1988). This is particularly so where, as here, the nature and size of the transaction require the employer to transfer sufficient liabilities in order to afford the transaction itself.

justify the Court's substitution of its judgment for that of the company.

Plaintiffs have failed to show that BFG acted in a fiduciary capacity when it transferred the liability for their welfare benefits to UGTC. Plaintiffs have further failed to establish any breach of fiduciary duties, even if such duties were deemed to apply to BFG's conduct. For these reasons, we hold that the district court was correct in granting summary judgment to defendants on plaintiffs' breach of fiduciary duty claims.

B.

Plaintiffs also argue that defendants breached their contractual duties under ERISA. The district court correctly held that plaintiffs cannot succeed on their contract-based ERISA claims because their welfare benefits were not vested at the time of their retirement.

While ERISA requires pension benefits to vest upon employees' retirement, welfare benefits do not automatically vest. *See* 29 U.S.C. § 1051(a) (excluding welfare benefit plans from ERISA's vesting provisions); *Helwig v. Kelsey-Hayes Co.*, 93 F.3d 243, 248 (6th Cir. 1996), *cert. denied*, __ U.S. __, 117 S. Ct. 690 (1997). However, employers may choose to vest welfare benefits by entering into a private agreement with their employees that is set forth in the plan documents. *See Inter-Modal Rail Employees Ass'n v. Atchison, Topeka & Santa Fe Ry. Co.*, __ U.S. __, 117 S. Ct. 1513, 1516 (1997); *Sprague, et al. v. General Motors Corp.*, 133 F.3d 388, 400 (6th Cir.) (en banc), *cert. denied*, __ U.S. __, 118 S. Ct. 2312 (1998). Because vested benefits are forever unalterable, and because employers are not legally required to vest them, this Court recently held that "the intent to vest [welfare benefits] 'must be found in the plan documents and must be stated in clear and express language.'" *Id.* (quoting *Wise v. El Paso Natural Gas Co.*,

986 F.2d 929, 937 (5th Cir. 1993)). Plaintiffs bear the burden of proving that BFG intended to vest their benefits. *See id.*

The district court correctly found that the plan documents in this case do not express a clear and affirmative intent to vest employees' welfare benefits. Regardless of whether the reservation of rights clause in the "Highlights" booklet may properly be considered part of the SPDs, there is simply no language in the SPDs themselves that clearly expresses an intention to vest the benefits.[6] Plaintiffs point to statements such as "if you retire and are eligible for a pension you shall continue to have the same health coverage," found in the 1977 Hospitalization Plan SPD, and argue that the language suggests an intent to continue benefits for the retiree's lifetime. We agree with the district court that such language neither expressly guarantees lifetime benefits nor creates an ambiguity as to whether such benefits are vested. Somewhat more persuasive but also insufficient to convey a clear intent to vest is language in the plans providing that a retiree's spouse will continue to receive benefits after the retiree dies "until death or remarriage." While this language may imply generally that benefits are to continue at the same rate provided to the retiree at his or her death, it falls far short of expressing a clear intent to render such benefits "forever unalterable."[7]

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[6] At the time the relevant SPDs were issued, there were no actual "plans" separate and apart from the SPDs themselves. Accordingly, the only relevant plan documents are the SPDs.

[7] Although the district court found that the plan documents were not ambiguous as to whether BFG intended to vest welfare benefits, the court also found in the alternative that even if the plan language were deemed ambiguous and extrinsic evidence of intent were considered, plaintiffs could not satisfy their burden of showing the requisite intent. We find no need to reach plaintiffs' arguments regarding extrinsic evidence because the plan documents are not ambiguous and do not express a clear intent to vest the welfare benefits.

Plaintiffs also argue that BFG remains contractually liable for providing their welfare benefits because BFG failed to obtain the transferred retirees' consent. This argument also fails because plaintiffs' benefits were never vested. BFG never entered into a contractual agreement to continue providing plaintiffs welfare benefits at the level they were receiving at the time of their retirement. Therefore, BFG did not improperly delegate such a contractual duty. Just as BFG would not have been required to obtain plaintiffs' consent if it decided to terminate their welfare benefits altogether, the company was not required to obtain their approval to transfer its liability for paying them. *See Musto v. American General Corp.*, 861 F.2d 897, 912 (6th Cir. 1988) (noting that an employer had no duty to establish a welfare benefit plan, "much less one that could never be amended without the approval of those to whom it applied").[8]

The plan documents do not express a clear intention by BFG to vest welfare benefits. Accordingly, we conclude that the district court correctly granted summary judgment to defendants on plaintiffs' contract-based ERISA claims.

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[8]In *Howe v. Varity Corp.*, 36 F.3d 746 (8th Cir. 1994), *aff'd on other grounds*, 516 U.S. 489 (1996), the court summarily concluded that an employer violated its fiduciary duties under ERISA when it transferred its obligation to pay retirees' benefits to a nearly-bankrupt company without informing the retirees' of the change or obtaining their consent. *See id.* at 756. The Supreme Court declined to review this portion of the Eighth Circuit's opinion because it construed the petition for certiorari as not having raised the issue. We find that the Eighth Circuit's holding as to the retirees is limited to the unique and egregious facts of that case, in which the employer deceived its employees and essentially attempted to conceal its underhanded actions with respect to the retirees by keeping them in the dark as to the status of their benefits. To the extent that the Eighth Circuit's holding is grounded in the retirees' lack of consent to the transfer, however, we agree with the district court's conclusion that it is an anomaly within the case law governing the scope of employer action subject to ERISA's fiduciary standards.

III.

Plaintiffs' complaint in this case stems from the perceived unfairness of their welfare benefits having been reduced. The district court correctly found, however, that plaintiffs cannot prevail on their claims where their benefits never vested and where no breach of BFG's fiduciary duties has been shown. ERISA simply does not impose the obligations on employers with respect to welfare benefit plans that plaintiffs seek to enforce.[9] The judgment of the district court is **AFFIRMED**.

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[9] In contrast, ERISA provides for automatic vesting of pension plan rights and places strict limitations on an employer's ability to transfer pension plan liabilities. *See* 29 U.S.C. §§ 1051, 1058. Plaintiffs cannot in this forum obtain a greater degree of security for their welfare plan benefits than that which Congress has required.

APPENDIX B — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION FILED JUNE 29, 1997

DOWD, J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. 5:96-CV-0316

Glen H. Sengpiel, et al.,

Plaintiffs,

vs.

The B.F. Goodrich Company, et al.,

Defendants.

MEMORANDUM OPINION
(Resolving Docket Nos. 53 and 55)

* * *

I. INTRODUCTION

The plaintiffs, salaried retirees of the B.F. Goodrich Company ("BFG") bring this action under the Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.* ("ERISA"). They challenge the 1985 transfer of their retirement

benefits to a newly formed company, the Uniroyal Goodrich Tire Company ("UGTC") and subsequent reductions in those benefits by UGTC and its successor in interest, Michelin North America, Inc. ("Michelin"), Named as defendants are BFG, UGTC, Michelin, and the employee welfare benefit plans sponsored by BFG and UGTC/Michelin. The defendants have filed motions for summary judgment, and the matter has been briefed extensively and well by all parties. For reasons set forth below, the Court grants the motions for summary judgment and will publish a judgment entry dismissing the case.

II. FACTUAL BACKGROUND

A. The Parties

Glen H. Sengpiel retired from BFG on December 1, 1976. At the time of his retirement he was Corporate Director of Employee Relations. (Sengpiel affid. at ¶1). Donald R. Gottschalk was Corporate Employee Relations Representative at the time of his retirement on January 1, 1982. (Gottschalk depo. at 13). Donald E. Kelly was a foreman in plant cleaning for BFG's Akron Main Street Facilities when he retired on July 1, 1982. (Kelly depo. at 10, 14). These plaintiffs purport to represent a class of similarly situated BFG salaried retirees.[1] (Amended Complaint [Docket No. 26] at ¶¶ 8-14).

Defendants are 1) BFG and its benefit plans, the B.F. Goodrich Pension Plan, the B.F. Goodrich Life Insurance Plan, the B.F. Goodrich Hospital-Surgical-Medical Basic Plan, the B.F. Goodrich Prescription Drug Benefit Plan, and the B.F.

1. At a status conference on August 7, 1996, the Court announced it would defer consideration of whether to certify a class until dispositive motions were fully considered.

Goodrich Major Medical Plan; 2) UGTC and its benefit plans: the Uniroyal Goodrich Pension Plan, the Uniroyal Goodrich Tire Company Health Care Plan, the Uniroyal Goodrich Tire Company Prescription Drug Plan, and the Uniroyal Goodrich Tire Company Life Insurance Plan, and 3) Michelin, as UGCT's successor in interest.

B. The Employee Benefit Plans

A few months prior to Sengpiel's retirement, he received a document detailing pension and benefit levels, among which was a benefit of $25,000 in life insurance. The calculations were followed by a section entitled "Employee's Release" and stating in relevant part:

> I have read and understand the above calculation and agree to accept the payments of Total Monthly Pension in the amount set forth above, in settlement of my rights under all B.F. Goodrich Employee Benefit Programs applicable to me, subject, however, to all future reductions permitted in accordance with the provisions of the Company's Pension Program applicable to me; and in consideration of such payments, I hereby release and forever discharge the Company from any other obligations under its present or future Employee Benefit Programs except for payments of future premiums on my adjusted Group Life Insurance and payment of Hospitalization Program benefits to the extent described in such applicable Programs. . . .

(Sengpiel affid. Exh. A). Sengpiel testified that prior to his retirement he was given a notebook entitled, "Design for

Protection: B.F. Goodrich Salaried Benefit Program." The notebook included sections entitled, "The B.F. Goodrich Hospitalization and Surgical Program," "The B.F. Goodrich Major Medical Insurance Plan," "The B.F. Goodrich Life Insurance Plan," "The B.F. Goodrich Pension Plan," and "The B.F. Goodrich Prescription Drug Benefit Plan." Each section was a dozen or more pages long and contained descriptions of benefits provided under the plan. The sections were written prior to ERISA and therefore were not Summary Plan Descriptions as that term is defined under ERISA. With the exception of the major medical plan, BFG did not expressly retain the right to modify or discontinue the benefits offered.[2]

In 1977, in conformance with the newly enacted ERISA, BFG prepared Summary Plan Descriptions ("SPDs") for each of its plans. It distributed the SPDs to all salaried and wage

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2. The major medical plan contained the language, "It is hoped that BFG can offer the Major Medical Expense Insurance indefinitely, but, as is customary in Group Insurance Plans, the right to change or discontinue the Plan at any time must be reserved." (Plan at p.18). On the other hand, the hospitalization and surgical plan contained no such express reservation. In a section entitled "Coverage for Retirees," the plan stated, "Employees who retire and who are eligible for a pension will be eligible for coverage. The benefits for a retiree will be the same for him and his eligible dependents as when actively employed. . . . The surviving spouse of a retiree who at the date of the retiree's death was covered, will continue to be covered until the earlier of the date of death or remarriage." (Sengpiel affid. at Exh. B-1 at p. 11). The prescription drug benefit plan simply stated that coverage would terminate when coverage under the hospitalization plan terminated. (*Id.* at Exh. B-6) at p.8). The life insurance plan allowed retirees to keep up to $25,000 in life insurance, with the company paying for $10,000 of the insurance and the retiree paying the balance at a rate of 35 cents per $1,000 of insurance, the same rate as paid prior to retirement. (Sengpiel affid. at Exh. B-4) at p. 9).

employees in a vinyl portfolio.[3] The first booklet in the portfolio was entitled "Highlights" which summarized the benefits available to employees. The first paragraph of the Highlights booklet stated:

> This brochure highlights some of the benefits available to BFGoodrich Salaried employees. If there is any conflict between the brief descriptions presented here and the formal plans themselves, the latter will govern in all cases. While the Company expects to continue these benefits indefinitely, it reserves the right at its option to change or discontinue any or all of the programs at any time.

(Exh. 3 to affid. of BFG's Gary Habegger). Although the Highlights booklet contained this "reservation of rights" clause, none of the individual SPDs contained similar language through which the company reserved the right to change or discontinue the plans.

Sengpiel had been retired for a few months when the packet containing the plan descriptions and the Highlights booklet was distributed. However, he testified that as corporate director of employee relations he was aware of the language in the Highlights booklet prior to his retirement. (Sengpiel depo. at pp. 30-33).

The portfolio of SPDs was revised in 1981, and new SPDs, including a new Highlights booklet containing the same reservation of rights clause, were distributed to all salaried employees that year. (Affid. of Gary Habegger, vice president

3. BFG submitted an original version of the vinyl portfolio to the Court (Docket No. 92).

of human resources for BFG, at ¶4). Again, none of the accompanying SPDs contained a reservation of rights clause.

Habegger testified that Gottschalk and Kelly, along with other active BFG employees, would have received the 1977 and 1981 SPDs and Highlights booklets. (Habegger affid. at ¶¶3-4). The plaintiffs do not dispute the creation or distribution of the SPDs or the Highlights booklet. Kelly says he probably received the documents; Gottschalk said he does not remember whether or not he received them. (Kelly depo. at 14-15; Gottschalk depo. at 25-27).

At the time of their retirements in 1982, Kelly and Gottschalk authorized a deduction from their pension payments for a portion of their $25,000 life insurance benefit. BFG paid for the first $10,000 of life insurance; Kelly and Gottschalk financed the additional $15,000 at a monthly rate of 35 cents per $1,000 as provided in the plan. (Gottschalk affid. exh. C).

In 1986 BFG sent salaried retirees an updated SPD on the BFG Health Care Plan. The booklet was revised because of changes in the plan effective May 1, 1986.[4] The SPD contained the disclaimer, "The BFGoodrich Company expects to continue the Health Care Plan indefinitely but reserves the right to amend, suspend or terminate the Plan at any time." Other than the pre-ERISA major medical plan summary, this was the first time an individual summary plan description contained the reservation of rights language.

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4. Changes included requirements for second opinions for certain surgical procedures. The new SPD also incorporated changes made to the plan in 1984 and 1985. (Habegger affid. exh. 4).

Appendix B

C. The Transfer to UGTC

In early 1986 BFG and Uniroyal reached an agreement in principle in which each company would spin off its entire tire operations into a joint venture, the Uniroyal Goodrich Tire Company, to be owned in equal parts by BFG and Uniroyal. The plan called for the assets and liabilities of each company's tire business to be combined into the new joint venture. The liabilities included the pension and welfare benefit obligations to tire-related retirees. Pursuant to ERISA requirements, BFG transferred funds sufficient to support its pension obligations to the transferred retirees. BFG did not transfer any funds to support the welfare benefits of the transferred retirees.[5]

The provision in the joint venture agreement ("JVA") regarding employee benefit plans required UGTC (referred to as "the Partnership") to

> establish and adopt welfare plans which are comparable, taken as a whole, to the welfare plans . . . of Goodrich and Uniroyal which cover employees of the Uniroyal Tire Business and the Goodrich Tire business that will be hired by the Partnership. [The Partnership] shall assume all liability of Goodrich and Uniroyal for benefits under their present or past welfare plans or those of their predecessors for active, former and retired employees of the Goodrich Tire Business or the Uniroyal Tire Business.

(JVA at §8.4).

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5. ERISA has no provision requiring transfer of assets to accompany transferred welfare benefit plans. BFG did not use a trust fund to pay welfare benefits, instead paying those benefits out of current revenues.

Appendix B

In addition to transferring liability for the pension and welfare benefits of retirees who worked in the tire division, BFG decided it was necessary to transfer the benefits of a percentage of retirees who did not work directly for its tire division, but instead worked on the company's corporate staff. That staff included many retirees whose responsibilities involved both tire and non-tire operations throughout their careers. BFG's chief executive officer, John Ong, testified at deposition that the corporate structure of both venture partners (BFG and Uniroyal) was similar:

> [W]hile our tire businesses were organized as so-called divisions of the company, both of us maintained a fairly substantial corporate organization and a lot of the required administrative functions relating to the tire business were performed not by people in the Uniroyal Tire Division or BFGoodrich Tire Division, but by our corporate staffs.
>
> We had a company-wide accounts receivable department and company-wide accounts payable. We had a union relations department, for example. Those employees were all so-called corporate employees. . . .
>
> Both companies felt that they wanted to transfer all the assets and all the liabilities of their respective tire businesses. The assets were fairly straightforward in terms of plants, special equipment and so on, and active work force. The liabilities, of course, included among other things, pension liabilities. And it was the intention during the negotiations, of which I was

> the principal negotiator, from the outset that we would transfer the liability of everybody who had had an economic impact on the tire business of the respective companies at that time.

(Ong depo. at 7-8). Ong testified further that "there was no way, given the nature of the records that we had of retirees," to determine how much work each individual corporate retiree had done for the tire division. (*Id.* at 22). However, the company did have a "very precise allocation system" in which the company "charged off or allocated the cost of most of those corporate departments to the various business divisions which they served, tire group; chemical group; aerospace division; and so forth." (*Id.* at 23). BFG decided to use the allocation system to determine "what percent of our so-called corporate effort had been, in effect, part of our tire business." (*Id.* at 24). In this manner, BFG determined that 42.54 percent of the corporate effort had been devoted to the tire business. Accordingly, BFG decided to transfer 42.54 percent of its corporate retirees to the retiree rolls of the newly-formed UGTC.

BFG elected a simple method of determining which corporate retirees would be transferred: anyone with a Social Security number ending in 4254 or lower was selected.[6] Because

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6. BFG's Habegger testified he never calculated whether this method of selection actually resulted in approximately 42.54 percent of the retirees being transferred. (Habegger depo. at 31). Records provided by an expert hired by the plaintiffs indicated that 420 out of 1,024 potential retirees, or 40.93 percent, were transferred. (Report of Richard L. Einsporn, Docket No. 96). There is no explanation why BFG did not attempt to make an adjustment to ensure that the desired number of retirees, or 42.54 percent, was transferred to the UGTC rolls.

the Social Security numbers of Sengpiel, Kelly and Gottschalk fall in that category, they were among 420 corporate retirees transferred to the new company for purposes of administration and provision of pension and welfare benefits. The retirees were notified of the transfer by letter dated June 6, 1986, signed by Albin E. Ulle, BFG's vice president for human resources. After explaining that the transferees had been chosen by "random selection based upon Social Security number," the letter discussed the impact of the transfer on retirement benefits:

> It is important for you to understand that when you become covered by the Uniroyal Goodrich programs, the amount of any pension benefits you may be receiving will not be changed or reduced in any way. The terms and conditions of the payment of those benefits likewise will not change. This is assured by Federal law. Assets required to pay benefits to which you are entitled will be transferred from BFGoodrich to Uniroyal Goodrich.
>
> Likewise, your assignment to the Uniroyal Goodrich retirement rolls means that current life insurance and medical benefits programs for which you may now qualify will be continued, with the understanding that, as in the past, certain provisions may be changed in the future in accordance with the plans.

(Def. Exh. G).

A number of retirees protested the transfer. Gottschalk wrote to Ulle, questioned the legal basis for making such a transfer, and said, "I am certain we will receive no

improvements due to the change and probably can look forward to further cuts as have been occurring." (UGTC/Michelin Exh. D). Sengpiel and Kelly registered their protests in direct conversations with Ong. Both testified Ong assured them they would be treated no differently than corporate retirees remaining on BFG's books. (Sengpiel depo. at 39; Kelly depo. at 19).

In 1987, BFG decided to sell its interest in UGTC to Clayton & Dubilier, a private investment firm. This transaction set off another flurry of protests from BFG retirees. Several contacted Ong directly. Ong responded by letter to Gottschalk and several other retirees. (BFG exh. J). Ong stressed that the pension obligations had been funded by BFG prior to transfer and that additional steps had been taken to prevent UGTC's pension fund from being diluted. He then discussed the status of the welfare benefit plans in the following excerpt which has been a major source of controversy in this litigation:

> Turning now to your concerns regarding your retiree medical benefits and the continuance of your life insurance. Retiree medical and life insurance benefits are not paid from a trust fund but are paid from current revenues. You are correct that UGTC has undertaken the primary obligation to provide you with these benefits. We are confident that Uniroyal Goodrich will continue to be a major factor in the North American tire business and will continue to discharge its obligations to you. I can assure you that, although the obligation to pay these benefits is with UGTC, you may properly look to Goodrich to satisfy the rights you enjoy pursuant to the retiree medical benefits plan and the retiree life

> insurance plan in the unlikely event UGTC fails to provide them.
>
> Those rights are, of course, as described in written plans and you should understand that nothing that I have expressed in this letter is intended to alter any plan or expand any of those rights, and I do not intend by this letter to imply that the right to amend those plans is waived. Similarly, however, nothing in the assumption of liability by UGTC is intended to diminish such rights as you may have under those plans or to prevent you from looking to Goodrich to honor them if UGTC fails to do so.

(BFG exh. J). Gottschalk testified that the letter allayed his concerns and convinced him not to try to organize his fellow retirees into filing a class action lawsuit against BFG. (Gottschalk depo. at 63-64).

The plaintiffs allege that the existence of an indemnification agreement between BFG and UGTC, executed at the time of the creation of the joint venture, is evidence that BFG never intended to make good on any failure by UGTC to provide benefits. In the agreement, entitled "Assumption of Liabilities and Indemnification Agreement Relating to the Goodrich Tire Business," UGTC agreed to indemnify and hold BFG harmless from any liability associated with BFG retirees who were transferred to the UGTC retirement rolls. (Exh. D attached to affid. of John Wolfe). The plaintiffs allege that this agreement insulated BFG from any liability associated with its former retirees and rendered Ong's promise illusory.

Appendix B

In 1990 BFG amended its pension and welfare benefit plans for retirees. The changes included 1) an increase in the deductible amount from $100 to $150 per year for individuals and from $200 to $300 per year for families, and 2) an increase in the pension of $40 per month. The plaintiffs were not impacted by these changes because they had been transferred to the rolls of UGTC. Thus since 1990 there has been a difference between the benefits received by retirees on the BFG plans and retirees on the UGTC plans.

D. UGTC's 1995 Change in Benefits

In 1995, retirees on the UGTC plans, including the plaintiffs, received cuts in the welfare benefits provided to them. Specifically, 1) UGTC would no longer reimburse retirees and their spouses for their monthly Medicare premium; 2) medical and prescription drug coverage, previously provided at no charge, would cost each retiree $10 per month for individual coverage and $40 per month for family coverage; 3) annual deductibles increased from $100 to $150 per individual and $200 to $300 per family; 4) the annual co-payment maximum, formerly $450 per individual and $550 per family, increased to $1,000 regardless of the number of individuals covered; 5) coordination with Medicare benefits changed in a manner such that benefits were always calculated under the assumption the retirees had Medicare coverage; and 6) life insurance coverage was reduced from a maximum of $25,000 to $5,000. (Amended Complaint at ¶39 and Attachment).

Again, retirees who formerly had been covered under BFG plans complained. Ong responded in writing to the retirees, informing them he had registered their concerns to the chief executive officer of UGTC but telling them BFG was powerless

to force UGTC to make changes. Ong also said in the letter that the increases in deductible and co-payments were the same increases imposed by BFG on its retirees in 1990.[7] (BFG exh. K). Ong wrote to the former BFG retirees a few months later and informed them that UGTC had told him it stood by its decision to reduce welfare benefits. (BFG exh. L).

E. The Claims

The plaintiffs' amended complaint, pleaded under the broad parameters of ERISA, is not broken down into specific causes of action. It does provide a detailed recitation of factual and legal allegations, including a) at the time of their retirement, the plaintiffs were promised that their pension and welfare benefits would be paid by BFG (¶15); b) because the they were not employed in BFG's tire division, they never should have been transferred to the retirement rolls of UGTC (¶19); c) the transfer could not lawfully have been made without their consent (¶26); and d) reliance on the pledges in Ong's 1988 letter tolled the statute of limitations on this action (¶30).

Paragraph 11 of the amended complaint frames the issues the plaintiffs seek this Court to resolve: 1) whether BFG

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7. The record supports Ong's statement that BFG's deductibles had been raised in 1990 to the level UGTC began to charge in 1995. However, the record is unclear on whether the co-payment maximum of $1,000 had been raised as well. Ong testified that the $1,000 maximum was in effect (Ong depo. at 76-77). Sengpiel answered in the affirmative when asked if he knew BFG's plans had the same "deductible and co-pay" as UGTC. (Sengpiel depo. at 36). However, the Court is unable to find evidence in any of the SPDs or any letter from BFG announcing an increase in co-payment maximum from the $450 per individual and $550 per family as articulated in its 1986 SPDs.

breached its fiduciary duty to the plaintiffs by transferring them to the UGTC rolls through "the arbitrary use of [their] Social Security numbers"; 2) whether BFG could transfer the retirees without their consent; 3) whether BFG is still primarily liable to the plaintiffs for their pension and welfare benefits notwithstanding the transfer; 4) whether, if BFG is not primarily liable, it is secondarily liable and required to pay the difference between the plaintiffs' reduced benefits and the benefits currently provided by BFG to its retirees; 5) whether the assignment of ERISA-related obligations to UGTC was arbitrary, capricious and in violation of the plaintiffs' ERISA rights; and 6) whether the transfer of the plaintiffs to the UGTC rolls should be rescinded and set aside.

The plaintiffs seek the following relief: 1) a judgment ordering BFG to "reassume and be responsible to" the plaintiffs for welfare benefits; 2) a judgment ordering BFG to pay the additional costs incurred by the plaintiffs due to the 1995 decreases in coverage; 3) a judgment ordering UGTC/Michelin to transfer the plaintiffs back to the retirement rolls of BFG; and 4) other unspecified appropriate equitable relief and attorney fees.

BFG has asserted a cross-claim against UGTC/Michelin based upon the indemnification agreement described on pages 23a-25a *supra*. That cross-claim is not at issue.

III. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. When considering a motion for summary judgment, "the inferences to be drawn from the underlying facts contained in [affidavits,

pleadings, depositions, answers to interrogatories, and admissions] must be viewed in the light most favorable to the party opposing the motion." *U.S. v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). *See, e.g., U.S. v. Hodges X-Ray, Inc.*, 759 F.2d 557, 562 (6th Cir. 1985) and cases cited therein. The Court's favorable treatment of facts and inferences, however, does not relieve the nonmoving party of the responsibility "to go beyond the pleadings" to oppose an otherwise properly supported motion for summary judgment under Rule 56(e). *See Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

Once the moving party satisfies his or her burden to show an absence of evidence to support the nonmoving party's case, *Celotex Corp. v. Catrett*, 477 U.S. at 323, the party in opposition "may not rest upon mere allegation or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). Although the showing required of the nonmoving party by Rule 56 does not go so far as to require that all opposition evidence be in a form admissible at trial, the rule does require the nonmoving party who has the burden of proof at trial to oppose a proper summary judgment motion "by any of the kinds of evidentiary material listed in Rule 56(c), except the mere pleadings themselves. . . . *Celotex Corp. v. Catrett*, 477 U.S. at 324. General averments or conclusory allegations of an affidavit, however, do not create specific fact disputes for summary judgment purposes. *See Lujan v. National Wildlife Federation*, 497 U.S. 871, 888-89 (1990). Furthermore, unsworn statements and affidavits composed of hearsay and non-expert opinion evidence, "do not satisfy Rule 56(e) and must be disregarded." *See Dole v. Elliott Travel & Tours, Inc.*, 942 F.2d 962, 968-69 (6th Cir. 1991) (quoting *State Mutual Life Assurance Co. v. Deer Creek Park*, 612 F.2d 259, 264 (6th Cir.

1979) and citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158 n.17 (1970)). Nor may a party "create a factual issue by filing an affidavit, after a motion for summary judgment has been made, which contradicts . . . earlier deposition testimony." *Reid v. Sears Roebuck & Co.*, 790 F.2d 453, 460 (6th Cir. 1986) (citing *Biechell v. Cedar Point, Inc.*, 747 F.2d 209, 215 (6th Cir. 1984)).

On a motion for summary judgment, the Court will consider "[o]nly disputes over facts that might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby*, 477 U.S. at 248. Non-material facts will not be considered. Neither will the judge attempt to weigh the material evidence or determine its truth. *Anderson v. Liberty Lobby*, 477 U.S. at 249. The judge's sole function will be to determine whether there is a genuine issue for trial such that "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Id.* (citations omitted).

Where the nonmoving party "has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof," summary judgment is appropriate. *Celotex Corp. v. Catrett*, 477 U.S. at 323 (equating the standard for a directed verdict under Rule 50(a) with the summary judgment standard of Rule 56). If the evidence is "merely colorable," or is "not significantly probative," the Court may decide the legal issue and grant summary judgment. *Anderson v. Liberty Lobby*, 477 U.S. at 249-50 (citing *Dombrowski v. Eastland*, 387 U.S. 82 (1967) (*per curiam*) and *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 290 (1968)). " 'The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could

reasonably find for the plaintiff.' " *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1477 (6th Cir. 1989) (quoting *Anderson v. Liberty Lobby*, 477 U.S. at 252).

In sum, "[t]he inquiry performed is the threshold inquiry of determining whether there is the need for a trial — whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.", *Anderson v. Liberty Lobby*, 477 U.S. at 250.

IV. DISCUSSION

A. Introduction

ERISA's civil enforcement provision, 29 U.S.C. § 1132(a), reads in relevant part as follows:

> A civil action may be brought —
>
> (1) by a participant or beneficiary —
>
> . . .
>
> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;
>
> . . .
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice

> which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan; . . .

As detailed in their amended complaint and shown clearly in their prayer for relief, *see* page 31a, *supra*, the gravamen of the plaintiffs' challenge is that their transfer to the retirement rolls of UGTC was a breach of BFG's fiduciary duty to them, owed by virtue of 29 U.S.C. § 1104.[8] This states a cause of action under 29 U.S.C. § 1132(a)(3) quoted above.

The Court finds this to be an extraordinarily difficult case. Despite the parties' best efforts to convince the Court otherwise, the Court believes no case law is precisely on point with respect to several of the key issues. Thus analysis is guided by comparison to other cases by analogy, always keeping in mind the policy implications guiding the authors of ERISA.

After careful study of the undisputed facts in light of ERISA and the applicable case law, the Court is of the view that BFG's transfer of the plaintiffs to the UGTC retirement rolls for purposes of providing pension and welfare benefits was not a fiduciary act. Thus the act could not have amounted to a breach of any fiduciary duty owed by BFG to the plaintiffs. Summary judgment will be awarded with respect to the breach of fiduciary duty claim.[9]

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8. 29 U.S.C. § 1104 is quoted at page 37a *infra*.

9. An issue not developed by the parties but spotted by the Court is whether the plaintiffs could recover at all in their individual capacities

(Cont'd)

Appendix B

The plaintiffs' contract claims present even more difficult issues. After extensive deliberation on the matter, the Court's contract-based analysis will proceed as follows: 1) BFG's attempt to import the reservation of rights clause from the Highlights booklet into all of the accompanying SPDs is unpersuasive; thus the SPDs are deemed not to have a reservation of rights clause; 2) nonetheless, the plaintiffs fail to sustain their burden of showing that the SPDs reflect an intent that welfare benefits would be guaranteed for life; and 3) even if the Court were to construe the SPDs as ambiguous, permitting the consideration of extrinsic evidence, the weight of the evidence does not support the plaintiffs' claim of vesting.

B. The Transfer Was Not a Fiduciary Act

ERISA sets forth the fiduciary responsibility with respect to employee benefit plans at 2 U.S.C. §§1101-1104. The statute requires the following standard of care:

(Cont'd)

even if they were successful in proving a breach of fiduciary duty theory. The plaintiffs contend that BFG's transfer of their benefits constituted "a breach of the fiduciary duties that BFGoodrich *owed to its salaried Corporate retirees*." (Amended Complaint at ¶26 [emphasis added]). However, the Supreme Court has made clear that the fiduciary duties created under ERISA are owed to *the plan* and not to the *plan participants*. *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 140 (1985). *See also Vespasian v. Sweeney*, 52 F.3d 327 (table), 1995 WL 154982 (6th Cir. 1995) (ERISA "permits recovery by or on behalf of a plan — but does not permit recovery by an individual beneficiary — for a breach of fiduciary duty") (citing *Russell*). The Court is reluctant to dispose of this case on a case not briefed by the parties and has no need to do so, given the analysis hereinafter.

Appendix B

> [A] fiduciary shall discharge his duties *with respect to a plan* solely in the interest of the participants and beneficiaries and —
>
> (A) for the exclusive purpose of:
>
> (i) providing benefits to participants and their beneficiaries; and
>
> (ii) defraying reasonable expenses of administering the plan;
>
> (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims; . . .

29 U.S.C. § 1104(a)(1) (emphasis added). The threshold issue for the plaintiffs' breach of fiduciary duty claim is to show that the spinning off of 42.54 percent of BFG corporate retirees into UGTC constituted a "fiduciary" act for purposes of ERISA.

ERISA defines the word "fiduciary" precisely. The statute states in relevant part:

> [A] person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of

> such plan or exercises any authority or control respecting management or disposition of its assets, . . . or (iii) he has any discretionary authority or discretionary responsibility in the management of such plan.

29 U.S.C. § 1002(21)(A). Courts have relied closely upon that definition when analyzing whether a particular act is a "fiduciary" act for purposes of ERISA.

In light of the above-quoted statutory provisions, when determining whether fiduciary obligations attach to the activities related to welfare benefits plans, courts have interpreted ERISA to distinguish between the "administration" of such plans and the "establishment," "amendment," or "termination" of the plans. Although an employer "clearly must satisfy fiduciary duties when *administering* benefit plans, it is equally plain that simply because an employer is also a benefits plan administrator, ERISA does not require that day-to-day corporate business transactions, which may have a collateral effect on prospective, contingent employee benefits, be performed solely in the interest of plan participants." *Adams v. Avondale*, 905 F.2d 943, 947 (6th Cir.), *cert. denied*, 498 U.S. 984 (1990) (emphasis added) (quotation and citations omitted).

The Supreme Court cited the Sixth Circuit's *Adams* case when announcing a succinct rule in *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1996): "Employers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans."

There is no question that the statutory scheme of ERISA treats pension plans quite differently from welfare benefit plans.

Appendix B

Pension plans are subject to strict funding, vesting and termination regulations, none of which are present with respect to welfare benefit plans. Discussing the legislative history underlying ERISA, *Adams* noted:

> Although Congress considered imposing vesting requirements on welfare benefits, it decided to limit vesting to pension plans in order to keep costs within reasonable limits. Apparently, Congress chose not to impose vesting requirements on welfare benefit plans for fear that placing such a burden on employers would inhibit the establishment of such plans. In drawing the line between employer actions subject to the fiduciary duty requirement and those not, we must avoid any rule that would have the effect of undermining Congress' considered decision that welfare benefit plans not be subject to a vesting requirement. We are compelled, therefore, to reject plaintiffs' proposed rule that welfare benefit plans such as the one before us be amended or terminated only when such action would be in the best interests of the employees. . . . Instead, we employ the rule . . . that *a company does not act in a fiduciary capacity when deciding to amend or terminate a welfare benefits plan.*

Id. at 947 (emphasis added) (quotation and citation omitted). *See also Musto v. American General Corp.*, 861 F.2d 897 (6th Cir. 1988), *cert. denied*, 490 U.S. 1020 (1989) ("The case law, in any event, makes it clear that when an employer decides to establish, amend, or terminate a benefits plan, as opposed to managing any assets of the plan and administering the plan in accordance with its terms, its actions are not to be judged by

fiduciary standards"); *Lockheed Corp. v. Spink*, __ U.S. __, __ 116 S.Ct. 1783, 1789 (1996) ("Because the defined functions in the definition of fiduciary do not include plan design, an employer may decide to amend an employee benefit plan without being subject to fiduciary review") (quotation omitted).

Citing the foregoing authority, the defendants argue that BFG's decision to transfer the plaintiffs and other salaried retirees to the retirement rolls of UGTC did not involve plan "administration" or "management" as those terms are construed under ERISA and thus did not constitute a fiduciary act under ERISA. The Court agrees.

It appears to the Court that the cases and the statute provide a fairly clear delineation of what does nor does not constitute a fiduciary act. As summarized in *Adams*, *supra*, establishing, amending or terminating a benefits plan is *not* a fiduciary act, while "managing . . . assets of the plan and administering the plan in accordance with its terms" is a fiduciary act. *Musto*, 861 F.2d at 897. The fiduciary responsibility is tied to plan management and administration.

To some extent, spinning off members of a plan is *sui generis*; it falls easily into no category. Neither side has provided a case precisely on point. Keeping in mind the case law arising out of ERISA and the limited definition of "fiduciary" in the statute, the Court essentially must choose whether the spinoff is more akin to 1) amending, modifying or terminating the then-existing plans (in which case it would not be a fiduciary act), or 2) managing or administering those plans (in which case it would be a fiduciary act).

Although the analogy is not perfect, the Court is of the view that the spinoff at issue is more appropriately characterized as a modification or termination of the plans, at least with respect to the affected employees, than it is characterized as management or administration of those plans. The spinoff involved neither managing nor administering the welfare benefit plans; rather, the spinoff was a major business decision, i.e., a "corporate business transaction[] which [had] a collateral effect on prospective, contingent employee benefits." *Adams*, 905 F.2d at 947.

Because the issue is unique, the Court must make its decision with little citation to direct authority. However, an overall reading of the cases, from both the Supreme Court and the Sixth Circuit, reveals certain themes, such as 1) fiduciary responsibilities under ERISA were limited intentionally by Congresses; 2) employers/administrators are generally free to amend, modify or terminate welfare plans; and 3) the public policy rationale beyond limitation of welfare benefit plan regulation, i.e., excessive regulation would be a disincentive to providing such plans, compels a constrained evaluation of what constitutes a fiduciary function.

For these reasons the Court holds that BFG's decision to transfer the plaintiffs to the UGTC rolls as part of creation of the joint venture was not a fiduciary act under ERISA. Thus the claim of breach of fiduciary duty fails. However, even if the Court were to have found that the transfer was a fiduciary act, it would find further that BFG violated no fiduciary duty in making the transfer. Transferring a proportionate share of corporate retirees to the new entity was a reasonable outgrowth of the corporate decision to start a new business venture. Basing the selection process on Social Security numbers was as fair

and as random as any other method. BFG complied with federal law respecting transfer of assets to meet pension obligations[10] and secured a promise from UGTC to provide "comparable" welfare benefits. (Joint Venture Agreement at §8.4).[11] This distinguishes the case from *Howe v. Varity Corp.*, 36 F.3d 746

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10. Although the plaintiffs occasionally couch their complaint in terms of both pension and welfare benefits, there is no real controversy regarding the pension plans. There has been no reduction in pensions for UGTC retirees. It is true that retirees remaining on BFG rolls received a $40 per month pension increase in 1991, at the same time health insurance deductibles rose for those same retirees while remaining stable for UGTC retirees. The plaintiffs sought no legal redress at that time. Although plaintiffs now claim entitlement to the monthly increase retroactive to 1991, it is clear that there is no entitlement to non-vested pension increases following transfer from a plan. *Dougherty v. Chrysler Motors Corp.*, 840 F.2d 2, 3 (6th Cir. 1988) (employer has no fiduciary duty to guarantee future, nonvested benefits) (citing cases). So long as the transfer itself was legal (which the Court holds today), the defendants had no duty under ERISA to provide future benefits increases to the transferees.

11. While effectively conceding BFG has the right to amend the benefit plans, the plaintiffs argue that such a right did not transfer to UGTC. They claim no document expressly conferred such a right on UGTC. The plaintiffs essentially argue that UGTC was the provider of *BFG's* benefits. However, no fair reading of the agreement between BFG and UGTC could lead to any other conclusion than that the new benefit plans were UGTC's and not BFG's. The relevant section of the Joint Venture Agreement stated that the new entity would "*establish* and adopt welfare plans which are *comparable*, taken as a whole, to the welfare plans . . . of Goodrich and Uniroyal." (JVA at §8.4) (emphasis added). This implies far more than merely being a caretaker for BFG's plans. Based on the record, it is not reasonable to infer that UGTC, as a separate legal entity "establishing" its own "comparable" plans, would be bound by BFG's decisions in its own separate plans.

(8th Cir. 1994), *aff'd on other grounds*, __ U.S. __, 116 S.Ct. 1065 (1996), relied upon by the plaintiffs, in which the employer was found to have breached its fiduciary responsibility to the plaintiffs by shifting them to a newly formed company which was known to be bankrupt from its inception. The plaintiffs in this case do not even allege, much less prove, bad faith on the part of BFG at the time it created UGTC, and bad faith was an element of the breach of fiduciary claim in *Howe*.[12]

C. Plaintiffs' ERISA Contract-Based Claim

In addition to the breach of fiduciary duty claim, the plaintiffs also assert that the defendants are liable under a contract-based ERISA theory for failing to provide benefits as promised at the time of retirement. Such an argument can be

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12. Tellingly, *Howe* stated that the mere "decision to create [a new company] and to transfer certain assets to it, for example, was *not* by itself a violation of ERISA. It may have been unwise or bad business, but that is not the same thing as a breach of fiduciary duty." *Howe*, 36 F.3d at 753 (emphasis added).

Howe also contains language indicating the Eighth Circuit further found a breach of fiduciary duty in the fact that retirees' benefit obligations were transferred to the new company without their consent. However, *Howe* is the only cited ERISA case even hinting that the consent of retirees is required for plan transfer, and it is not controlling in this circuit. The Court is of the view that the portion of the *Howe* opinion grounded in lack of consent of the retirees, while arguably helpful to the plaintiffs, is an anomaly contrary to the wave of other case law on the extent of fiduciary responsibilities under ERISA. The hard fact for the plaintiffs is that if ERISA does not require consent for outright termination of benefits, it cannot logically be held to require consent for a transfer of benefits liability which was not made in bad faith.

successful only if the plaintiffs can show that their benefits vested at retirement at the level of coverage they are now claiming. The plaintiffs allege that the SPDs confer vesting and that evidence outside the SPDs further evinces the intent of the parties that their welfare benefits would be vested.

1. Vesting of Welfare Benefits

As discussed previously, ERISA welfare benefits are not presumed to have vested. "Until benefits have vested, employers may modify or terminate them, *whether or not they have reserved the right to do so.*" *Helwig v. Kelsey-Hayes Co.*, 93 F.3d 243, 248 (6th Cir. 1996), *cert. denied*, __ U.S. __, 117 S.Ct. 690 (1997) (emphasis added) (citing *Curtiss-Wright*, 514 U.S. at 78). Thus the plaintiffs can prevail only if they can establish an agreement that welfare benefits provided by BFG would vest, i.e., could never be reduced.

In determining whether the parties have contracted for welfare benefits, a court "must look to the intent of the parties and apply federal common law of contracts to determine whether welfare plan benefits have vested." *Gill v. Moco Thermal Indus., Inc.*, 981 F.2d 858, 860 (6th Cir. 1992). The inquiry starts with the plan documents themselves. Under ERISA, an employee benefit plan must be established and maintained pursuant to a "written instrument." 29 U.S.C. § 1102(a)(1). In determining the intent of the parties, a court first look to the "written instrument" which forms the agreement for clear manifestations of intent. *See Policy v. Powell Pressed Steel Co.*, 770 F.2d 609, 614 (6th Cir. 1985), *cert. denied*, 475 U.S. 1017 (1986). *See also in re White Farm Equipment Co.*, 788 F.2d 1186, 1193 (6th Cir. 1986) ("the parties may themselves set out by agreement or by private design, as set

out in plan documents, ~~whether retiree~~ welfare benefits vest, or whether they may be terminated"). It is hornbook law that if the written instrument is clear and unambiguous, the court should look no further. However, if the written instrument contains ambiguities, the Court may consult extrinsic evidence in an attempt to determine the intent of the parties. *Boyer v. Douglas Components Corp.*, 986 F.2d 999, 1005 (6th Cir. 1993).

BFG maintains that the plaintiffs have no vested right to welfare benefits because BFG clearly reserved its rights to modify or terminate the plans at any time. This was done, BFG asserts, through the clause in the Highlights booklet which it maintains is part of its Summary Plan Descriptions. In this circuit, a reservation of rights provision in a Summary Plan Description prevails over any argument by a retiree that lifetime benefits have been provided through other language in the plan. *Musto v. American General Corp.*) , 861 F.2d 897, 902 (6th Cir. 1988). *See also Sprague v. General Motors Corp.*, 92 F.3d 1425, 1437, *vacated and pet'n for hearing en banc granted*, 102 F.3d 204 (6th Cir. 1996) ("Where a summary plan description contains both a reservation of right provision and a promise of lifetime benefits, the general rule in this Circuit is that the plan unambiguously retains the company's right to amend the plan and that provision must govern"). Thus if the Court were to find that the Highlights booklet was a part of the SPDs, this would be a much easier case; it would be clear the plaintiffs would be foreclosed from arguing they had vested rights through the SPDs.

However, the Court finds that the Highlights booklet is *not* a part of the SPDs. It is separate and apart from the SPDs and has none of the characteristics of an SPD as required by

ERISA.[13] It simply purports to summarize the other booklets and cannot be read to affect the retirees in any substantive manner. Indeed, the Highlights booklet itself states, "If there is any conflict between the brief descriptions presented here and the formal plans themselves, the latter will govern in all cases." The attempted reservation of rights in the Highlights document cannot be presumed to be imported into each SPD. Thus with one exception,[14] the SPDs in effect at the time of the plaintiffs' retirement contained no express reservation of rights clauses.

However, the mere absence of a reservation of rights clause does not establish that plan benefits are vested. *Helwig*, 93 F.3d at 248 ("Until benefits have vested, employers may modify them or terminate them, whether or not they have reserved the right to do so"). Plaintiffs bear a greater burden than merely showing the absence of a reservation of rights clause. It is the plaintiffs' burden to show that it was "the intention of the parties" that the benefits provided at retirement would continue for life. *Armistead v. Vernitron Corp.*, 944 F.2d 1287, 1298 (6th Cir. 1991). Because under ERISA welfare benefit plans normally do not vest, plaintiffs must establish an affirmative obligation

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13. 29 U.S.C. § 1022 requires a summary plan description to include such information as the name and type of administrator, the name and address of the agent, procedures for appeal and ERISA rights. Requirements are detailed in 29 C.F.R. § 2520.102-3 (contents of Summary Plan Descriptions).

14. The 1974 Major Medical Plan, effective at the time of Sengpiel's retirement, continued a reservation of rights clause. However, the updated version of the plan in 1977 contained no such clause. No other plan in effect at the time of the plaintiffs' retirement contained a reservation of rights clause.

by BFG to guarantee the benefits at issue for life. Courts may not casually infer the existence of vesting; doing so would undercut Congress' considered decision that, while pension benefits are strictly regulated and guaranteed, welfare benefits have no such protection. *See White Farm*, 788 F.2d at 1191 (comparing ERISA regulation of pension v. welfare programs). *See also Wise v. El Paso Natural Gas Co.*, 986 F.2d 929, 937 (5th Cir.) ("extra-ERISA commitments must be found in the plan documents and must be stated in clear and express language"), *cert. denied*, 510 U.S. 870 (1993); *Gable v. Sweetheart Cup Co., Inc.*, 35 F.3d 851, 855 (4th Cir. 1994) (courts may not lightly infer the existence of an agreement to vest benefits), *cert. denied*, __ U.S. __, 115 S.Ct. 1442 (1995).

In the Sixth Circuit, the following SPD language was held sufficient to confer vesting of benefits in *Helwig*, 93 F.3d at 248:

> When you are retired, your Health Care coverages, except for vision, are continued without cost to you.
>
> If you terminate employment with Kelsey-Hayes at age 65 or older for any reason other than discharge, all of your Health Care coverages, except vision care, will be continued *for the rest of your life* without cost to you.

Id. at 248 (emphasis added). *See also Policy v. Powell Pressed Steel Co.*, 770 F.2d 609, 614 (6th Cir. 1985) (language providing health insurance coverage during the life of the pensioner at no cost to the pensioner' . . . clearly means that the pensioner will receive health benefits for the remainder of his life"), *cert. denied*, 475 U.S. 1017 (1986).

Appendix B

In contrast to the above-quoted language, the SPDs at issue do not provide a clear and affirmative commitment by BFG to provide benefits for life. For example, the hospitalization brochure at the time of Sengpiel's retirement stated, "Employees who retire and who are eligible for a pension will be eligible for coverage." (Sengpiel affid. at Exh. B-1 at 11). The hospitalization SPD in effect when Kelly and Gottschalk retired stated, "If you retire and are eligible for a pension, you shall continue to have this same health coverage." (Gottschalk affid. at Exh. D at 11). There is no promise of lifetime benefits.[15]

2. Reference to Extrinsic Evidence

The plaintiffs argue that the language in the SPDs is ambiguous, allowing the Court to consult extrinsic evidence to determine the intent of the parties. "[I]n this circuit, before a district court can consider extrinsic evidence of the parties' intent, it must find an ambiguity on the face of the contract." *Schachner v. Blue Cross and Blue Shield of Ohio*, 77 F.3d 889, 893 (6th Cir.), *cert. denied*, __ U.S. __, 117 S.Ct. 173 (1996).

A contract is ambiguous if it is subject to two reasonable interpretations. *Wulf v. Quantum Chem. Corp.*, 26 F.3d 1368, 1376 (6th Cir.) *cert. denied*, 513 U.S. 1058 (1994). "*If* a court determines that a contract provision is ambiguous, *then* it 'may use traditional methods of contract interpretation to resolve the

15. It is true that some of the plans contained language stating that the surviving spouse of a retiree would be eligible benefits until "death or remarriage." The Court does not believe that the retirees can bootstrap themselves into a lifetime of vested benefits because of language referring to coverage for spouses in the event they predecease the spouse, particularly when there is no similar promise of benefits to retirees to cover them during their lifetimes.

ambiguity, including drawing inferences and presumptions and introducing extrinsic evidence.' " *Schachner*, 77 F.3d at 893 (emphasis in original) (citing *Wulf*, 26 F.3d at 1376). The Sixth Circuit has emphasized that courts must find a true ambiguity before resorting to extrinsic evidence:

> Courts may not . . . use extrinsic evidence to create an ambiguity. Rather, the ambiguity must be patent; that is, apparent on the face of the contract. *In Local 783, Allied Industrial Workers v. General Electric Co.*, 471 F.2d 751 (6th Cir.), *cert. denied*, 414 U.S. 822, 94 S.Ct. 120, 38 L.Ed.2d 55 (1973), we wrote that "[o]nly when the court has determined that the contract is ambiguous is a construction of the clause necessary. After a finding of ambiguity has been made, extrinsic evidence is admissible to aid in its interpretation."

Schachner, 77 F.3d at 893 (citation omitted).

Thus without a finding that the SPD language is ambiguous, the Court is not free to consult extrinsic evidence to determine the plaintiffs' contract-based ERISA rights. The plaintiffs argue that the lack of a reservation of rights clause renders the SPDs ambiguous. The Court disagrees. Accepting the plaintiffs' argument would allow a court, every time a plan does not contain a reservation of rights clause, to declare a plan ambiguous and resort to extrinsic evidence. This comes very close to placing the burden on the defendant to show that a plan is *not* vested rather than maintaining the burden on the plaintiff to provide an affirmative showing of vesting.

In sum, the mere lack of a reservation of rights clause does not render the SPDs ambiguous. A fair reading of the SPDs

does not indicate that BFG intended to guarantee the benefits to retirees for life. Thus the plans are not "subject to two reasonable interpretations," *Wulf*, 26 F.3d at 1376, and the Court is not permitted to consult extrinsic evidence.[16]

3. In Any Event, Extrinsic Evidence Would Not Help the Plaintiffs

Even if the Court were to have found the language of the SPDs to be ambiguous, consulting all of the available extrinsic evidence would not have led to a different decision. Despite troubling conflicts in the extrinsic evidence, the plaintiffs fail to meet their burden of establishing the parties intended benefits to vest at the time of retirement.

Primary among the extrinsic evidence is the reservation of rights clause contained in the Highlights booklet. As discussed previously, the clause was not sufficiently incorporated into the SPDs to be considered a part of those documents. However, if the Court expanded its inquiry to include extrinsic evidence, the clause would be a strong indication that BFG did not intend the benefits to vest.[17]

---

16. The lack of vesting language in this case is illustrated by comparing the language to language which has been held to provide vesting of benefits. *See Helwig*, 93 F.3d at 246 (all of your Health Care coverages . . . will be continued for the rest of your life without cost to you") and *Policy*, 770 F.2d at 611 ("Despite anything to the contrary herein contained, present pensioners . . . will . . . receive medicare complimentary coverage . . . during the life of the pensioner at no cost to the pensioner").

17. BFG could hardly be accused of attempting to hide its intent to reserve rights. The Highlights booklet was the first booklet in the packet of SPDs, and the reservation of rights clause was in the first paragraph of the Highlights booklet.

Appendix B

Moreover, the plaintiffs' contention that all of their welfare benefits vested for life at the time of their retirement is fatally undercut by their own representations in this case. In an earlier brief in this case, plaintiffs' counsel conceded that the plaintiffs "do not challenge the abstract legal right of [BFG] to amend or terminate retiree welfare benefit plans . . . ." (Docket No. 32 at 2). This is contrary to the current contention that some or all benefits became fully vested at the time of their retirement by virtue of the language in the SPDs. Moreover, to a greater or lesser degree, each plaintiff conceded he had not been promised lifetime benefits by BFG at the time of retirement. Kelly testified during his deposition as follows:

> Q. Did [BFG representative Toni Bright] describe[] for you the benefits you were getting upon retirement?
>
> A. That's right.
>
> Q. Did he make any representation to you that those benefits would last the rest of your life without change?
>
> A. He didn't make anything, no.
>
> Q. He simply described what you were getting when you retired?
>
> A. That's right, when I retired.
>
> Q. Did any representative of BFGoodrich ever tell you that these benefits would continue for the rest of your life without change?
>
> A. No.

(Kelly depo. at 35). Sengpiel testified as follows:

> Q. What is it you want out of this lawsuit, sir?
>
> A. To be transferred back to the BFGoodrich Company.
>
> Q. Anything else?
>
> A. That's it.
>
> Q. You understand that Goodrich is free to change your benefits at any time?
>
> A. Yes, sir. I also understand that their benefits for the people that were in the lottery that stayed with BFGoodrich are much better than ours.

(Sengpiel depo. at 79).[18] Gottschalk's testimony was more equivocal but was otherwise similar to the testimony of the other two plaintiffs:

> Q. No one from Goodrich ever told you that your benefits would stay the same for the rest of your

---

18. Although Sengpiel provided an affidavit saying he was told at the time of his retirement that his benefits would continue for life, he acknowledged in the above-quoted passage of his deposition that the benefits could change and also testified he was aware of the reservation of rights provision in the Highlights booklet prior to his retirement. A party may not "create a factual issue by filing an affidavit, after a motion for summary judgment has been made, which contradicts . . . earlier deposition testimony." *Reid v. Sears Roebuck & Co.*, 790 F.2d 453, 460 (6th Cir. 1986).

life and never be reduced or changed? Is that correct?

A. I think the employees, over the years, understood —

Q. Mr. Gottschalk, I didn't ask whether you understood —

A. I've got to answer.

Q. The question is did anybody ever tell you that?

A. No. No. There was no reason to receive that type of a comment.

(Gottschalk depo. at 50).

By their own admission and the admission of counsel, plaintiffs' quarrel is not with cutbacks *per se*; it is with cutbacks *by UGTC*.[19] This is at odds with their argument that they believed their benefits became non-forfeitable at the time they retired.

---

19. The plaintiffs make no argument that UGTC, pursuant to its plans, has not reserved the right to modify or terminate the plans. Indeed, they could make no such argument; UGTC has submitted documentation that its health care plans for BFG retirees contain a reservation of rights clause (Docket No. 84). To the extent the plaintiffs challenge the fact that the changes were made by UGTC rather than BFG, their argument really is with the fact of the *transfer* rather than the fact of the *reduction*. As the Court has previously held in Section IV.B., the transfer was not unlawful.

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Looming in the background is one significant piece of extrinsic evidence favorable the plaintiffs to some degree. As discussed on page 3 *supra*, at the time of their retirement the plaintiffs signed a form entitled "Employee's Release." The form stated the following:

> I have read and understand the above calculation and agree to accept the payments of Total Monthly Pension in the amount set forth above, in settlement of my rights under all B.F. Goodrich Employee Benefit Programs applicable to me, subject, however, to all future reductions permitted in accordance with the provisions of the Company's Pension Program applicable to me; and in consideration of such payments, I hereby release and forever discharge the Company from any other obligations under its present or future Employee Benefit Programs except for payments of future premiums on my adjusted Group Life Insurance and payment of Hospitalization Program benefits to the extent described in such applicable Programs. . . .[20]

The plaintiffs argue that these releases are evidence of the parties' intent that life insurance and hospitalization benefits would be vested. The defendants contend that, at best, the releases confine any purported "contract right" to be limited "to the extent described in [the] applicable [p]rograms." Because "the applicable programs" have reduced their benefits, the plaintiffs are not entitled to more than what they currently receive, according to the defendants.

---

20. Sengpiel's release form contained an additional paragraph in which he agreed not to be employed by a competitor for a period of five years.

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The Court finds it exceedingly difficult to reconcile the language of the releases with the rest of the documentary and testimonial evidence in the case. If the Court were to delve into extrinsic evidence, there is a clear conflict on critical points. In the plaintiffs' favor is the language of the release. In the defendants' favor are the fact that BFG's intent has been published in the Highlights booklet since 1977 and the plaintiffs and their counsel have in fact acknowledged they BFG's "abstract legal right" to reduce their benefits.

The Court is of the view that, evaluating the extrinsic evidence as a whole, the plaintiffs have failed to meet their burden of establishing that the parties, by private design, agreed to vest benefits which normally are not vested under ERISA. The language of the employee's releases does not overcome the lack of a clear commitment to vest in the SPDs, the constant and conspicuous statement of reserved rights in the Highlights booklet and the on-the-record assertions of the plaintiffs and their counsel acknowledging BFG's legal right to change benefits.

The Court adds a final note before concluding its discussion on the employee releases. If the Court were to have held that the release overrode the SPDs and all conflicting extrinsic evidence, several negative consequences would flow to the plaintiffs. First, any relief for the plaintiffs would clearly be limited to life insurance and hospitalization benefits. This is because the release, if operative, would "forever discharge the Company from any other obligations under its present or future Employee Benefit Programs." Second, the release would be construed to limit the plaintiffs' benefits under the life insurance and hospitalization benefits to the benefits provided to them *at the time of their retirement*. Although such a conclusion would

restore the plaintiffs to a higher life insurance benefit, the plaintiffs would see reductions in many categories of hospitalization benefits. For example, the plan in effect when Sengpiel retired provided a maximum of $10 per day for doctor's visits, while the program in effect when Kelly and Gottschalk retired provided $25 for the first day's visit and $17 for subsequent visits. Although these benefits were subsequently increased by BFG, it would be logically inconsistent to allow the plaintiffs to benefit from the plan improvements and be exempt from negative plan changes, such as the present reservation of rights clauses in the Michelin plans.[21] Thus enforcement of the release forms would be a pyrrhic victory at best and could be harmful to the plaintiffs.

4. The Ong Letter

The plaintiffs offer one other ground to sustain a contract claim against BFG. They argue that CEO Ong's letter to Gottschalk and a handful of other retirees constituted a promise by the company to provide benefits equal to the benefits provided to BFG corporate retirees who had not been transferred to the UGTC rolls.[22]

---

21. There is absolutely no language in any writing indicating that BFG promised or intended that retirees would receive increased levels of benefits throughout their retirement but would not be subject to any negative amendments.

22. The plaintiffs also refer to oral conversations between Ong and plaintiffs Kelly and Sengpiel. They allege Ong promised them orally that they "would be treated the same as the other Goodrich retirees" (Kelly depo. at 19). However, the Sixth Circuit has made clear that "the clear terms of a written employee benefit plan may not be modified or

(Cont'd)

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The Ong letter, written five years after the most recent retirement of any plaintiff, has no bearing on the intent of the parties at the time of retirement and thus was not relevant to the discussion on vesting.[23] However, as a potentially independent source of obligation on the part of the defendants, it bears close scrutiny. Again, it states in relevant part:

> Turning now to your concerns regarding your retiree medical benefits and the continuance of your life

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(Cont'd)
superseded by oral undertakings on the part of the employer." *Musto*, 861 F.2d at 910. This is because "ERISA makes it mandatory that 'every' plan be established and maintained under 'a written instrument.' " *Id.* (citing 29 U.S.C. § 1102(a)(1)). As Musto concluded:

> It is not always easy to determine exactly what a benefit plan says even when the language of the plan has been reduced to writing. If the terms of these often complex plans could be made to depend upon evidence as to oral statements that may not have been worded very precisely in the first place, that may have been made many years earlier, and that cannot be proved except through the testimony of lay witnesses whose memories will seldom be infallible and who, being human, may have tended to hear what they wanted to hear, the degree of certainty that Congress sought to provide for would be utterly impossible to attain.

Id.

23. Even if the letter were considered to bear upon the intent of the parties at the time of retirement, it would do more harm than good to the plaintiffs' vesting argument. This is because the letter stated that the company had the right to amend the plans. It does not manifest an intent that benefits would be vested at the time of retirement.

> insurance. Retiree medical and life insurance benefits are not paid from a trust fund but are paid from current revenues. You are correct that UGTC has undertaken the primary obligation to provide you with these benefits. We are confident that Uniroyal Goodrich will continue to be a major factor in the North American tire business and will continue to discharge its obligations to you. I can assure you that, although the obligation to pay these benefits is with UGTC, you may properly look to Goodrich to satisfy the rights you enjoy pursuant to the retiree medical benefits plan and the retiree life insurance plan in the unlikely event UGTC fails to provide them.
>
> Those rights are, of course, as described in written plans and you should understand that nothing that I have expressed in this letter is intended to alter any plan or expand any of those rights, and I do not intend by this letter to imply that the right to amend those plans is waived. Similarly, however, nothing in the assumption of liability by UGTC is intended to diminish such rights as you may have under those plans or to prevent you from looking to Goodrich to honor them if UGTC fails to do so.

(BFG exh. J). In the Court's view, the letter can be construed as being misleading to a lay person, particularly a person who is reading the letter looking for reassurances. Indeed, the tone of the entire three-page letter is one of reassurance.[24] Ong even provided a handwritten note to Gottschalk at the end of the letter stating in part, "I enjoyed talking with you on the phone

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24. The Court attaches a complete copy of the letter as Exhibit A.

earlier this afternoon and am glad my comments allayed your concerns. Thanks for writing."

Nevertheless, the Court cannot hold that this letter created obligations on behalf of BFG where such obligations had not existed previously. As discussed in Section IV.C.1, the plaintiffs have failed to establish that the SPDs conferred vested benefits at the time of retirement. In the absence of an agreement to vest, ERISA allows an employer to amend, modify or terminate a benefits plan. Indeed, Ong stated he did not intend to "imply that the right to amend those plans is waived." The result is that the letter, at least with respect to welfare plans,[25] pledged a good deal less than the retirees might have believed.[26]

The Court admits being troubled by what could be considered reasonable reliance upon the letter by the plaintiffs. The Court has considered the plaintiffs' argument that BFG should be equitably estopped from contending it is not required to make up the difference between the benefits currently received by the plaintiffs and the benefits received by non-transferred BFG retirees. The Sixth Circuit has held that principles of equitable estoppel are part of the federal common law of a contract-based ERISA action. *Armistead v. Vernitron Corp.*, 944 F.2d 1287 (6th Cir. 1991). The elements of equitable estoppel are: 1) conduct or language amounting to a representation of material fact; 2) awareness of the true facts

---

25. The letter devoted much more space to discussing the retirees' pensions and providing specific examples of action taken by BFG to ensure that the pensions would be fully provided for life.

26. The letter may take on greater legal significance should UGTC in the future fail to provide benefits (or reduce them to a de minimis level). That situation is not before the Court today.

by the party to be estopped; 3) an intention on the part of the party to be estopped that the representation be acted on; 4) unawareness of the true facts by the party asserting the estoppel; and 5) *detrimental* and justifiable reliance by the party asserting estoppel. *Id.* at 1298 (emphasis added).

Even if the plaintiffs were able to establish the first four elements of an equitable estoppel argument, their case would fail on the fifth. Reliance must be detrimental. The detriment claimed by the plaintiffs is the fact that they elected not to sue BFG after receiving the assurances by Ong. But there is no detriment in declining to sue because, under the Court's analysis, a lawsuit would not have reinstated them to the rolls of BFG any more successfully in 1989 than it does in 1997. This is because, as discussed previously, the transfer violated no fiduciary duty owed by BFG to the plaintiffs and the plaintiffs were unable to show a vesting of benefits. Thus the plaintiffs' argument based in equitable estoppel fails.[27]

D. UGTC/Michelin's Motion for Summary Judgment

The plaintiffs do not allege wrongdoing on the part of UGTC/Michelin. The only relief sought with respect to UGTC/Michelin is assignment away from its retirement rolls to the rolls of BFG. Because the Court has found that the transfer of the retirees to UGTC/Michelin does not violate ERISA, the relief sought by the plaintiffs cannot be granted. Therefore UGTC/Michelin's motion for summary judgment is granted.

---

27. Compare with *Armstrong v. Vernitron*, *supra*, in which the defendant was estopped from denying welfare benefits it promised to the plaintiffs *prior* to the plaintiffs taking early retirement. The plaintiffs relied upon that promise when they elected to take early retirement. In contrast, in the instant case the plaintiffs had been retired long before any promise made by Ong.

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V. CONCLUSION

The plaintiffs' claim that their transfer to the retirement rolls of UGTC constituted a breach of fiduciary duty on behalf of BFG is unsuccessful because the transfer was not a fiduciary act. The secondary claim that the 1995 reduction in benefits constituted a contract-based ERISA claim fails because the plaintiffs fail to establish that their benefits were vested.

For these reasons the Court grants the motions for summary judgment of BFG (Docket No. 55) and UGTC/Michelin (Docket No. 53). The Court will publish a judgment entry contemporaneously with the issuance of this memorandum opinion.

IT IS SO ORDERED.

s/ David D. Dowd, Jr.
David D. Dowd, Jr.
U.S. District Judge

Appendix B

EXHIBIT A

BFGoodrich

The BFGoodrich Company
3925 Embassy Parkway
Akron, Ohio 44313

John D. Ong
Chairman of the Board

January 12, 1988

Mr. Don R. Gottschalk
1115 Lucia Drive
Punta Gorda, Florida 33950

Dear Don:

Thank you for your letter of January 4 expressing your concerns about payment of the pension, medical and life insurance benefits you enjoy as the result of your retirement. Although we received only two or three inquiries from retirees at the time that The Uniroyal Goodrich Tire Company was created and the administration of retirement benefits assumed by it, your letter indicates that you and perhaps others feel uneasy about the arrangement that was made then. I had hoped that UGTC's provision of benefits over the past seventeen months would have alleviated any concerns you may have. I am, however, pleased to pass on to you these further assurances.

Let me first address your pension. As you undoubtedly know, pension payments are made from a trust fund of pension assets. When The Uniroyal Goodrich Tire Company was created in August of 1986, a portion of the assets which supported the separate pension plans for Goodrich salaried and hourly

employees were then transferred into pension asset trust funds to be administered by UGTC. UGTC has administered your pension since that time and I believe that you and all other retirees have regularly received your pension checks.

At the time of the formation of Uniroyal Goodrich, the pension assets transferred were sufficient to provide for the pensions of all retirees, including yourself, who were transferred to Uniroyal Goodrich, and there continue to be sufficient assets in the trust to provide for these obligations.

We took several steps to ensure that the transfer of pension obligations was conscientiously and prudently accomplished:

- We engaged an independent actuary, other than the plans' appointed actuary, to perform the necessary calculations and certify those calculations to the Internal Revenue Service.

- We followed ERISA guidelines in performing all the calculations relating to the transfers.

- We reviewed the entire process with outside legal counsel.

- We filed appropriate notification of the transfers with and received approval for the transfers from the Internal Revenue Service and the Pension Benefit Guaranty Corporation.

- We filed all the plans with the Internal Revenue Service for qualification under the Internal Revenue Code and received determinations of qualification.

- We filed appropriate notifications with the Department of Labor confirming that the transfers indeed took place.

The net result of the care we took in 1986 is that the assets in these funds are sufficient to meet the pension obligations owing to the Goodrich employees who, such as yourself, had then retired.

We are going one step further in our current transaction. In order to protect the trust funds from the possibility of dilution, we have received assurance from the principals who will control UGTC that, as part of our transaction, they will agree that neither of the former Goodrich pension plans (i.e., the salaried plan and the hourly plan) which UGTC administers will be merged with any other pension plan unless all plans which are part of the merger are fully funded.

Turning now to your concerns regarding your retiree medical benefits and the continuance of your life insurance. Retiree medical and life insurance benefits are not paid from a fund but are paid from current revenues. You are correct that UGTC has undertaken the primary obligation to provide you with these benefits. We are confident that Uniroyal Goodrich will continue to be a major factor in the North American tire business and will continue to discharge its obligations to you. I can assure you that, although the obligation to pay these benefits is with UGTC, you may properly look to Goodrich to satisfy the rights you enjoy pursuant to the retiree medical benefits plan and the retiree life insurance plan in the unlikely event UGTC fails to provide them.

Those rights are, of course, as described in written plans and you should understand that nothing that I have expressed in

this letter is intended to alter any plan or expand any of those rights, and I do not intend by this letter to imply that the right to amend those plans is waived. Similarly, however, nothing in the assumption of liability by UGTC is intended to diminish such rights as you may have under those plans or to prevent you from looking to Goodrich to honor them if UGTC fails to do so.

In your letter you also mention other benefits. I think that the other benefits you may have in mind come within the category of either retiree medical insurance or life insurance. I hope, therefore, that I have addressed all of your concerns and that I have been responsive to them.

With kind regards.

Sincerely,

s/ John D. Ong
John D. Ong

3105n

P.S. I enjoyed talking with you on the 'phone earlier this afternoon and am glad my comments allayed your concerns. Thanks for writing.

J

APPENDIX C — JUDGMENT ENTRY OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION FILED JUNE 30, 1997

DOWD, J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. 5:96-CV-0316

Glen H. Sengpiel, et al.,

Plaintiffs,

vs.

The B.F. Goodrich Company, et al.,

Defendants.

JUDGMENT ENTRY

For the reasons set forth in the Memorandum Opinion filed contemporaneously with this Judgment Entry, IT IS HEREBY ORDERED, ADJUDGED and DECREED that the motions for summary judgment of the B.F. Goodrich Company defendants (Docket No. 55) and the Uniroyal Goodrich Tire Company/ Michelin defendants (Docket No. 53) are granted. Each party to bear its own costs. Case closed.

s/ David D. Dowd, Jr.
David D. Dowd, Jr.
U.S. District Judge

APPENDIX D — RELEVANT STATUTES OF THE EMPLOYEE RETIREMENT INCOME SECURITIES ACT OF 1974

29 U.S.C. § 1002(14)(A) (ERISA § 3(14)(A))

(14) The term "party in interest" means, as to an employee benefit plan —

> **(A)** any fiduciary (including, but not limited to, any administrator, officer, trustee, or custodian), counsel, or employee of such employee benefit plan;

29 U.S.C. § 1002(16)(A) (ERISA § 3(16)(A))

(16)(A) The term "administrator" means —

> (i) the person specifically so designated by the terms of the instrument under which the plan is operated;
>
> (ii) if an administrator is not so designated, the plan sponsor; or
>
> (iii) in the case of a plan for which an administrator is not designated and a plan sponsor cannot be identified, such other person as the Secretary may by regulation prescribe.

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29 U.S.C. § 1002(21)(A) (ERISA § 3(21)(A))

(21)(A) Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 1105(c)(1)(B) of this title.

29 U.S.C. § 1051(1) (ERISA § 201(1))

§ 1051. Coverage

This part shall apply to any employee benefit plan described in section 1003(a) of this title (and not exempted under section 1003(b) of this title) other than —

(1) an employee welfare benefit plan;

29 U.S.C. § 1058 (ERISA § 208)

§ 1058. Mergers and consolidations of plans or transfers of plan assets

A pension plan may not merge or consolidate with, or transfer its assets or liabilities to, any other plan after September 2, 1974, unless each participant in the plan would (if the plan

then terminated) receive a benefit immediately after the merger, consolidation, or transfer which is equal to or greater than the benefit he would have been entitled to receive immediately before the merger, consolidation, or transfer (if the plan had then terminated). The preceding sentence shall not apply to any transaction to the extent that participants either before or after the transaction are covered under a multiemployer plan to which subchapter III of this chapter applies.

29 U.S.C. § 1104(a)(1), (A) and (B)
(ERISA § 404(a)(1), (A) and (B))

§ 1104. Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and —

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

Appendix D

29 U.S.C. § 1132(a)(1)(B) and (3)
(ERISA § 502(a)(1)(B) and (3))

§ 1132. Civil Enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought —

(1) by a participant or beneficiary —

* * *

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

* * *

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

Appendix D

29 U.S.C. § 1344(a) (ERISA § 4044(a))

§ 1344. Allocation of Assets

(a) Order of priority of participants and beneficiaries

In the case of the termination of a single-employer defined benefit plan, the plan administrator shall allocate the assets of the plan (available to provide benefits) among the participants and beneficiaries of the plan in the following order:

* * * *

Supreme Court, U.S.
FILED
JAN 8 1999
CLERK

No. 98-950

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

GLEN H. SENGPIEL, DONALD E. KELLY
and DONALD R. GOTTSCHALK,

Petitioners,

vs.

THE B.F. GOODRICH COMPANY, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Sixth Circuit correctly determine that an employer that transferred its pension and welfare plan obligations for retirees to a successor in interest without the consent of the retirees: (1) did not act as a fiduciary under ERISA; and (2) even if a fiduciary, did not breach its fiduciary duty because the benefits were not vested?

2. Did the Sixth Circuit correctly determine that a retired employee who seeks to prove a *vested* right to lifetime benefits must show clearly and affirmatively that the employer intended to provide such lifetime benefits?

STATEMENT PURSUANT TO RULE 29.6

Respondent Michelin North America, Inc. (successor in interest to Uniroyal Goodrich Tire Company, Inc.) is a subsidiary of Compagnie Generale Etablissement Michelin, a French entity the stock of which trades on the Paris Bourse (stock exchange). Michelin North America has no other parent companies, subsidiaries, or affiliates that have issued shares to the public.

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C. Petitioners' Attempt to Argue Contract Assignment Principles Does Not Square With ERISA's Regulatory Scheme. 16

II. The Petition Should Be Denied Because Petitioners Misread And Overstate The Sixth Circuit's Holding That Petitioners' Rights Did Not Vest. Contrary To Petitioners' Contention, The Sixth Circuit's Decision Is Consistent With Decisions By This Court And Other Circuit Courts. 20

A. The Sixth Circuit's Decision is Not Contrary to Decisions by Other Circuits or Prior Sixth Circuit Decisions. 20

B. Petitioners Ignore the Fact That Lower Court Holdings Issued After This Court Decided *Curtiss-Wright Corp. v. Schoonejongen* Have Adopted a Presumption That Retiree Welfare Rights Do Not Vest. 21

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STATEMENT OF THE CASE

A. Introduction

The petitioners, Glen H. Sengpiel, Donald R. Gottschalk, and Donald E. Kelly (collectively, "Petitioners"), all corporate salaried retirees of the B.F. Goodrich Company ("Goodrich"), brought an action in the United States District Court for the Northern District of Ohio against Goodrich, its benefit plans, Goodrich's successor in interest — the Uniroyal Goodrich Tire Company ("UGTC"), UGTC's benefit plans, and UGTC's successor in interest — Michelin North America ("Michelin"). Petitioners challenged the 1986 transfer of pension and other post-employment benefit plans and plan interests ("the 1986 Transfers") from Goodrich to UGTC on the ground that the 1986 Transfers violated the Employee Retirement Income Security Act of 1974, as amended ("ERISA").

The district court held that the 1986 Transfers were neither unlawful nor improper, and granted summary judgment in favor of the defendant corporations and their respective benefit plans. The district court opinion below was published at 970 F. Supp. 1322 (N.D. Ohio 1997) and is reprinted as Petitioners' Appendix B (hereafter, "Pet. App. B"). The United States Court of Appeals for the Sixth Circuit affirmed the judgment of the district court in all respects. The Sixth Circuit opinion below was published at 156 F. 3d 660 (6th Cir. 1998) and is reprinted as Petitioners' Appendix A (hereafter, "Pet. App. A"). Petitioners seek review of the Sixth Circuit's decision.

B. Facts

In 1977, to comply with a new federal law known as ERISA, Goodrich prepared booklets to summarize and explain the terms of each of its pension and welfare plans. These booklets, described by the new law as "summary plan descriptions" or "SPDs," were distributed to all employees in a single vinyl portfolio that included a more general overview called a "Highlights" booklet. (Pet. App. B at 20a-21a.) The final sentence in the first paragraph of the "Highlights" booklet clearly stated that:

> While the Company expects to continue these benefits indefinitely, it reserves the right at its option to change or discontinue any or all of the programs at any time.

(*Id.* at 21a.)

In 1981, Goodrich revised and updated the SPDs and republished the Highlights booklet — including the above-described reservation of rights clause. (*Id.*) None of the Petitioners deny having received either set of SPDs or the Highlights booklet. (*Id.* at 22a.) The individual SPDs did not contain disclaimers with the exception of Goodrich's Health Care Plan. (*Id.*) Updated in 1986, the SPD for the Goodrich Health Care Plan included the following reservation of rights clause:

> The B.F. Goodrich Company expects to continue the Health Care Plan indefinitely but reserves the right to amend, suspend, or terminate the Plan at any time.

(*Id.*)

In 1986, Goodrich embarked upon a joint venture with the Uniroyal Tire Company ("Uniroyal"). In that joint venture, Goodrich and Uniroyal each spun off its tire operations to form a new tire company capable of competing in the market place. (*Id.* at 23a.) That new company became known as UGTC; at its inception, Goodrich and Uniroyal owned UGTC equally. (*Id.*) The joint venture agreement identified the assets and liabilities that each company would contribute or transfer to the joint venture. Among the liabilities Goodrich spun off and contributed to the joint venture were the pension and welfare benefit plan obligations to retirees associated with Goodrich's tire division. (*Id.*)

The transfer of welfare benefit plan obligations to UGTC did not involve splitting up and spinning off part of the various welfare benefit plans then being maintained by Goodrich and Uniroyal. Rather, the joint venture agreement made clear that UGTC would establish and maintain new welfare benefit plans that would assume those welfare plan obligations being transferred by Goodrich and Uniroyal:

> [UGTC shall] establish and adopt welfare plans which are comparable, taken as a whole, to the welfare plans . . . of Goodrich and Uniroyal which cover employees of the Uniroyal Tire Business and the Goodrich Tire Business that will be hired by [UGTC]. [UGTC] shall assume all liability of Goodrich and Uniroyal for benefits under their present or past welfare plans or those of their predecessors for active, former, and retired employees of the Goodrich Tire Business or the Uniroyal Tire Business.

(*Id.*)

Goodrich did not transfer to UGTC any trusteed or specially earmarked funds to satisfy the welfare plan obligations that it had contributed to UGTC. Goodrich did not do so because ERISA does not (and in 1986, did not) require welfare plan obligations to be pre-funded. (*Id.*) However, Goodrich (and Uniroyal) did transfer operating assets and working capital to the joint venture capable of being used to satisfy their respective welfare plan obligations on an ongoing basis. By contrast, when Goodrich transferred the pension obligations to UGTC in 1986, it complied with ERISA's statutory pension funding requirements by also transferring to UGTC funds, in trust, that were earmarked to satisfy part of the transferred pension obligations. (*Id.*)

Goodrich did transfer the pension and welfare benefit plan obligations of those retirees who had worked exclusively in its tire division. (*Id.*) However, Goodrich concluded that it also should transfer the pension and welfare benefit plan obligations of some of its corporate retirees to preserve the original understanding between Goodrich and Uniroyal regarding the joint venture. (*Id.* at 24a.) Goodrich's organizational structure made it impossible to identify those corporate retirees who had worked exclusively with and for its tire division. (*Id.*) Because Goodrich concluded that it also would be impossible to identify those corporate retirees who had worked most closely with its tire division while with the

company, Goodrich based the transfer decision on the percentage of its total business that had consisted of tire manufacturing and sales. (*Id.* at 25a-26a.)

Goodrich calculated that 42.54% of its total business consisted of tire manufacturing and sales. (*Id.*) Based on that determined percentage, Goodrich transferred to UGTC the pension and welfare benefit plan obligations of 42.54% of its corporate retirees. (*Id.*) To identify those corporate retirees whose obligations would be transferred to UGTC, Goodrich adopted a lottery system based on Social Security numbers. Goodrich would transfer to UGTC the plan obligations relating to those corporate retirees with Social Security numbers ending in 4254 or lower; the plan obligations of those corporate retirees with Social Security numbers ending in digits higher than 4254 would remain with Goodrich. (*Id.*)

Because the Petitioners' Social Security numbers were beneath the 4254 threshold, they were among the 420 corporate retirees required to look to UGTC to satisfy and discharge their pension and welfare benefit plan rights. (*Id.* at 26a.) Goodrich notified all affected retirees by letter in June of 1986, prior to the transfers. (*Id.*) The June 1986 letter informed the affected retirees that, based on a random selection of their Social Security numbers, their pension and welfare benefits would be provided by UGTC. At the same time, the June 1986 letter assured the affected retirees that their pension benefits would not be changed or reduced in any way. However, the June 1986 letter made clear to the affected retirees — including Petitioners — that the rights of the transferred retirees under the "comparable" welfare benefit plans being established by UGTC would remain subject to change: (*Id.*)

> your assignment to the Uniroyal Goodrich retirement rolls means that current life insurance and medical benefits programs for which you may now qualify will be continued, with the understanding that, as in the past, certain provisions may be changed in the future in accordance with the plans.

(*Id.*)

Several of the affected retirees immediately protested the transfer. (*Id.*) Petitioner Gottschalk's protest implicitly recognized the changeable nature of the welfare benefit plans when he wrote, "I am certain we will receive no improvements due to the change and probably can look forward **to further cuts as have been occurring**." (*Id.* at 26a-27a; emphasis supplied.) Additional protests arose in 1987, when Goodrich sold its interest in UGTC to a private investment firm. (*Id.* at 27a.)

Most of the corporate retirees assigned to UGTC kept silent, though, when Goodrich in 1990 reduced the benefits being provided under its welfare benefit plans to the corporate retirees whose obligations had not been transferred to UGTC. (*Id.* at 29a.) One possible reason for the silence was that the corporate retirees whose plan-based rights had been assigned to UGTC were unaffected by the Goodrich reduction.[1] (*Id.*)

The welfare benefits being provided by UGTC to the transferred retirees under its welfare benefit plans remained superior to the benefits being provided by Goodrich until 1995, when rising health care costs forced UGTC to materially reduce the welfare benefits it was providing under its welfare benefit plans. (*Id.*) The retirees who had enjoyed superior benefits for the previous five years broke their silence and renewed their protests by demanding that their plan-based rights be re-transferred to Goodrich's plans. (*Id.*) Once it became clear that their protests would not lead to a re-transfer of their plan-based rights, Petitioners filed their Complaint in the Northern District of Ohio in February of 1996.

C. Procedural History

Petitioners' Amended Complaint, filed in June of 1996, enumerated several claims. Each claim was broadly pleaded under

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1. Among the 1990 Goodrich amendments was an increase in the deductible from $100 to $150 per year for individuals and from $200 to $300 per year for families.

ERISA. However, Petitioners did not allege a breach or other violation by UGTC or Michelin (UGTC's successor in interest) of any duty or obligation imposed on or undertaken by UGTC or Michelin. Petitioners also sought broad relief in their Amended Complaint. First, Petitioners sought to reverse the transfer of pension and other post-employment benefit plan obligations that Goodrich had initiated in 1986. Second, Petitioners sought an award of supplemental benefits, based on certain promises and assurances they claimed to have received from Goodrich officials, years after the transfer.

In granting summary judgment on all counts to Defendants, the district court specifically held that:

1. The 1986 transfers amounted to an amendment of the relevant plans by the plans' settlor and could not be considered a fiduciary act, because the transfers were the inevitable result of a major business decision.

2. Even if the 1986 transfers could be considered a fiduciary act, Goodrich did not breach any fiduciary duty when it engaged in those transfers, because the method adopted — the transfer of a proportionate percentage of corporate retirees to UGTC, based on Social Security numbers — was reasonable in context and as random as any other method.

3. Petitioners' contract-based claims failed because: (i) under ERISA, welfare benefit plan rights presumptively do not vest; (ii) Petitioners have the burden of proving an affirmative intent to vest Petitioners in their plan-based rights for life; and (iii) the documentary evidence that Petitioners produced was insufficient to establish an intent to vest under either a "fair reading" of the relevant

SPDs or a consideration of related documents such as the Highlights booklet distributed to Petitioners.

4. Because the 1986 transfers did not violate ERISA, and the only relief being sought from Michelin was a re-transfer to Goodrich of Petitioners' plan-based obligations, Petitioners had no viable claims against Michelin.

Petitioners appealed the district court's grant of summary judgment to the United States Court of Appeals for the Sixth Circuit. While Petitioners brought numerous claims before the district court, they appealed only two issues to the Sixth Circuit. First, Petitioners asserted that the district court erred in its finding that the transfer of the benefit plan obligations did not constitute a fiduciary act, and that the transfer amounted to a breach of fiduciary duty. Second, Petitioners asserted that the district court clearly erred when it held that Petitioners' contract-based claims were baseless, at least in part because Petitioners claimed that their welfare benefits at issue had vested.

The Sixth Circuit affirmed the district court on all grounds. First, the Sixth Circuit noted that Petitioners were not challenging Michelin's right to modify or reduce the benefits being provided under the Michelin benefit plans, because Michelin (and before it, UGTC) had always expressly reserved that right. The Sixth Circuit then focused on Petitioners' challenge to the validity of Goodrich's 1986 transfers to UGTC. In affirming the district court's holding that the 1986 transfers did not constitute a fiduciary act, the Sixth Circuit stated:

> [T]he fact that an action taken by an employer to implement a business decision may ultimately affect the security of employees' welfare benefits does not automatically render the action subject to ERISA's fiduciary duties. To adopt such a rule would, in effect, erode the well-established principle that employers are free to make decisions that modify, amend, or even terminate their employees' unvested welfare benefits.

(Pet. App. A at 11a.) The Sixth Circuit also affirmed the district court's holding that Petitioners had failed to establish a breach of duty on the part of Goodrich, even if the 1986 transfers did constitute a fiduciary act.

In addition, the Sixth Circuit affirmed the district court's determination that Petitioners' contract-based ERISA claims failed because their welfare benefit plan rights had not vested at the time of their retirement. In so doing, the Sixth Circuit stated that:

> [B]ecause vested benefits are forever unalterable, and because employers are not legally required to vest them, this Court recently held that "the intent to vest [welfare benefits] must be found in the plan documents and must be stated in clear and express language.

(Pet. App. A at 13a-14a, quoting *Sprague v. General Motors Corp.*, 133 F.3d 388, 400 (6th Cir.) (en banc), *cert. denied*, 118 S. Ct. 2312 (1998), quoting, in turn, *Wise v. El Paso Natural Gas Co.*, 986 F.2d 929, 937 (5th Cir.), *cert. denied*, 510 U.S. 870 (1993).) In so doing the Sixth Circuit specifically agreed with the district court's finding that the statements found in the 1977 SPDs did not expressly guarantee lifetime benefits or create ambiguity.

Finally, the Sixth Circuit rejected Petitioners' claim that Goodrich remained liable for its failure to obtain the transferred retirees' consent. Such consent was not necessary, the appeals court concluded, because the welfare benefits never vested. The court stated that "[j]ust as [Goodrich] would not have been required to obtain plaintiffs' consent if it decided to terminate their welfare benefits altogether, the company was not required to obtain their approval to transfer its liability for paying for them." (Pet. App. A at 15a.) Petitioners then sought this Court's review.

REASONS FOR DENYING THE WRIT

I. THE PETITION SHOULD BE DENIED BECAUSE NO CONFLICT EXISTS WITHIN THE LOWER COURTS. PETITIONERS MISREAD, MISCONSTRUE AND OVERSTATE THE HOLDING IN *HOWE v. VARITY CORP.*, 36 F.3d 746 (8TH Cir. 1994). GOODRICH SIMPLY DID NOT ENGAGE IN FIDUCIARY CONDUCT WHEN IT TRANSFERRED WELFARE PLAN OBLIGATIONS TO (THEN) UGTC.

Petitioners contend that for individuals who already have retired, the Sixth Circuit's decision below represents an irreconcilable split in how the Sixth Circuit Court of Appeals and the Eighth Circuit Court of Appeals apply the law to transfers of employee benefit plan-based obligations that result from a corporate transaction.

Petitioners misread the Eighth Circuit's holding in *Howe v. Varity Corp,* 36 F.3d 746 (8th Cir. 1994) ("*Howe II*") and ignore the prior proceedings that give *Howe II* context — particularly, the Eighth Circuit's earlier holding in *Howe v. Varity Corp.*, 896 F.2d 1107 (8th Cir. 1990) ("*Howe I*"). Contrary to Petitioners' contention,[2] the facts present in this case and in *Howe II* are *not* identical. The facts relating to the disclosures made in each case are particularly inapposite. *Howe II* involved the miscommunication of important plan information by a plan fiduciary. This case involves a plan sponsor's decision to split up its pension and welfare benefit plan obligations because the company itself was being split up. The two cases are dissimilar.

More important, Petitioners do not contend, as indeed they cannot, that a deep division now exists in how the federal appeals courts currently view the transfer of benefit plan obligations in

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2. *Cfr.* Pet. at 15, where Petitioners assert that "the facts of this case and the facts in *Howe II*, as to the employees who had already retired at the time of the creation of the successor company, are identical."

connection with a corporate transaction. Several federal appeals courts have rejected attempts to either preserve or protect, or overturn, benefit plan obligations that were transferred in connection with the sale or other disposition of a business and later modified by the assuming party. *See, e.g.*, *Systems Council EM-3 v. AT&T Corp.*, 159 F.3d 1376, 1379 (D.C. Cir. 1998) (upholding AT&T's transfer to Lucent Technologies of pension and welfare plan obligations and citing *Sengpiel* with approval); and *Lindenmeier v. Siemens Power Corp.*, 1995 U.S. App. LEXIS 31278, *6-7, *9-10 (9th Cir. Oct. 24, 1995) (unpubl.) (upholding Siemen's modification of welfare plan benefits, five years after it acquired the obligations from Exxon in conjunction with the purchase of a business unit from Exxon). *See also Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1510-14 (10th Cir. 1996) (upholding the right to modify or terminate health plan benefits, following the sale by Control Data Corporation to Seagate Technology of one of its divisions). To the contrary, those other federal appeals court decisions broadly support the actions taken by Goodrich in this case.

Accordingly, Petitioners' attempt to manufacture a conflict in the circuits should be squarely rejected, and the Petition for Writ of Certiorari should be denied.

A. Part V of *Howe II* Recognizes Only That a Fiduciary Breach Can Result From False Communications Made in Connection With a Transfer of Welfare Plan Obligations. *Howe II* Does Not Force Plan Sponsors to Perpetually Maintain a Welfare Plan That Provides Non-Vested Benefits.

Petitioners' split-among-the-circuits argument relies almost exclusively upon Part V of the majority opinion in *Howe II*. Petitioners take Part V out of context, and in the process miss the entire point of the Eight Circuit's holding in *Howe II*. In *Howe II*, the Eighth Circuit clearly found that Massey Ferguson ("M-F") was a fiduciary of the plans it was sponsoring and maintaining,

because M-F chose to directly involve itself in the process of communicating (or in some cases, not communicating) with affected plan participants and beneficiaries.

Contrary to Petitioners' contentions, though, the Eighth Circuit in *Howe II* found Varity Corporation liable as a plan fiduciary because of Varity's conscious decision to not properly and accurately communicate the transfer of plan liabilities and the effect of those plan transfers. The Eighth Circuit did *not* find Varity liable under ERISA as a result of its decision to create an undercapitalized subsidiary (Massey Combines Corporation, or "MCC") and transfer plan liabilities to it. An earlier passage, drawn from Part IV of the *Howe II* opinion, makes the key distinction that Petitioners pretend does not exist:

> Defendants' decision to create MCC and to transfer certain assets to it, for example, was not by itself a violation of ERISA. It may have been unwise or bad business, but that is not the same thing as a breach of fiduciary duty. Plaintiffs' proof here, however, goes beyond mere business decisions on the part of defendants. "[M]isleading communications to plan participants regarding plan administration . . . will support a claim for breach of fiduciary duty." *Berlin v. Michigan Bell Tel. Co.*, 858 F.2d 1154, 1163 (6th Cir. 1988).

Howe II, 36 F.3d at 753-54.

In addition, the Eighth Circuit did *not* find that the retirees had vested rights under the Varity medical benefit plans, as Petitioners imply. (Pet. at 16.) The opinion in *Howe II* makes this clear, especially when read together with the Eighth Circuit's 1990 opinion, when the litigants first presented the question of whether the retirees had vested rights. Compare *Howe II*, 36 F.3d at 750-53, with *Howe I*, 896 F.2d at 1109-10.

In view of the foregoing, it becomes apparent that Petitioners misread and overstate Part V of the Eighth Circuit's opinion in *Howe II* and have no basis for alleging a conflict between *Howe II* and the Sixth Circuit's decision below. That particularly is the case since the Eighth Circuit in *Howe II* clearly was following and applying the Sixth Circuit's holding in *Berlin v. Michigan Bell Tel. Co.* — the very appeals court Petitioners now contend conflicts with it. A review of Part V of *Howe II* makes clear that the Eighth Circuit was faulting Varity Corporation for what it had (or more precisely, had not) communicated — not with the decision to transfer plan liabilities *per se*:

> As we have indicated, these employees were simply "transferred" to MCC without their knowledge or consent. **They were given no explanation, they were not asked for permission, and they were not even informed** of the "transfer" until MCC went into receivership. **Such a complete disregard of the rights and interests of beneficiaries is a clear breach of fiduciary duty** in violation of Section 1104(a)(1), and the named individual plaintiffs have a right of action for redress under Section 1132(a)(3).

Howe II, 36 F.3d at 756 (emphasis added).

The Eighth Circuit in *Howe II* thus concluded that M-F breached its fiduciary duty to the already-retired employees only because M-F made no attempt to inform the retirees about the plan transfers or to take their interests into account. Decisions by the Eighth Circuit, rendered after *Howe II* and citing *Howe II*, confirm this reading. In both *Shea v. Esensten*, 107 F.3d 625, 628 (8th Cir.), *cert. denied*, 118 S. Ct. 297 (1997) and *Anderson v. Resolution Trust Corp.*, 66 F.3d 956, 960 (8th Cir. 1995), the Eighth Circuit cited *Howe II* for the proposition that an employer's failure or willful decision to not disclose important plan changes and developments to affected participants and beneficiaries can constitute a breach of fiduciary duty under ERISA.

In view of the fact that *Howe II* was clearly decided on the basis of fiduciary miscommunication, Petitioners' attempt to link *Howe II* to this case by depicting the facts as "identical" (Pet. at 15) is inappropriate. Here, the district court explicitly recognized that the plan transfers were communicated and explained to all of the affected retirees in 1986, *prior* to the 1986 Transfers. (Pet. App. B at 26a.) The Sixth Circuit likewise recognized that Goodrich promptly communicated its business decision to the affected retirees; that is why several retirees protested the Goodrich decision in 1986 and 1987. (Pet. App. A at 6a.) Even Petitioners concede that they knew in advance that their plan interests were being transferred. (Pet. at 8.)

Petitioners ignore the fact that participant miscommunications did not control the case below, and were tangential to Petitioners' principal contention.[3] Instead, Petitioners seize upon the *dicta* that the Eighth Circuit included at the end of Part V and seek to elevate it to a wholly new legal proposition:

> An obligor (here, M-F and Varity) cannot free itself of contractually created duties without the consent of the persons to whom it is obligated. Restatement (2d) of Contracts, Section 318(3), comment d. M-F and Varity cannot unilaterally relieve themselves of obligations to the individual retirees.

Howe II, 36 F.3d at 756.

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3. Petitioners did take issue with certain statements made by Goodrich officials in 1988, years after the plan transfers occurred. Neither Michelin nor UGTC (Michelin's predecessor) took part in such statements, or in any of the separate discussions between Petitioners and their former Goodrich colleagues. However, Petitioners have never shown, or been made to show, how statements made by company officials to former plan participants two years after those participants have been removed from the plans rise to the level of fiduciary communications, if and when the underlying relationship (*i.e.*, between participant and fiduciary) no longer exists.

Petitioners' out-of-context interpretation of the Eighth Circuit's "obligor" statement (from Part V of *Howe II*, above) simply does not stand up to close scrutiny, since the Eighth Circuit was referring to a class of participants who had no vested right to the plan benefits at issue. A plan sponsor that has the generally unfettered right to extinguish the "contractually created duties" it has elected to transfer to a third party is relatively unconcerned about the consequences of a breach by the third party. If such a breach occurs, the original obligor can simply "free itself" of those duties by taking back the obligation *and then terminating and extinguishing it*. In the proceedings below, the Sixth Circuit understandably dismissed this reading of *Howe II* as illogical. 156 F.3d at 664, n.5.

Simply stated, Petitioners misread and overstate *Howe II* in an attempt to manufacture a conflict between the Eighth Circuit and the Sixth Circuit. In reality, no such conflict exists. Because Petitioners' attempt to manufacture a conflict in the circuits from the holding in Part V of *Howe II* thus fails, their Petition for Writ of Certiorari should be denied.

B. The Transfer of Plan Obligations to a New Plan or New Plan Sponsor Constitutes a Plan Amendment, Not a Fiduciary Act. Petitioners' Attempt to Transform the 1986 Transfers Into a Fiduciary Act is Fundamentally at Odds With Prior Decisions by This Court.

Petitioners also contend that Goodrich's transfer of welfare benefit plan obligations was something other than a plan amendment, and instead constituted a form of fiduciary conduct subject to ERISA's fiduciary duty rules. Petitioners' central premise — that Goodrich necessarily engaged in fiduciary conduct once it decided to split the company (and with it, its benefit plans) into two almost equal parts — is wholly at odds with several recent pronouncements by this Court. Because this Court already has clearly drawn the line between settlor activity and fiduciary conduct in at least three decisions issued in the past four years, this Court

does not need to do so again. Accordingly, this Court should reject Petitioners' invitation to hear this case.

This Court has repeatedly stressed that the act of amending or modifying an employee benefit plan under ERISA constitutes a "settlor" function, not subject to ERISA's general fiduciary rules. In *Lockheed Corp. v. Spink*, 517 U.S. 882 (1996), this Court broadly reiterated what it had said two years earlier, in *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73 (1995):

> Plan sponsors who alter the terms of a plan do not fall into the category of fiduciaries. As we said with respect to the amendment of welfare benefit plans [citation omitted], "employers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans." When employers undertake those actions, they do not act as fiduciaries, but are analogous to the settlors of a trust.

Lockheed, 517 U.S. at 890 (quoting *Schoonejongen*, 514 U.S. at 78).

Within the past several weeks, this Court has again stressed that a plan sponsor's actions are not fiduciary in nature. In *Hughes Aircraft Co. v. Jacobson*, 1999 U.S. LEXIS 753 (January 25, 1999), *rev'g* 105 F.3d 1288 (9th Cir. 1997), this Court again was compelled to point out that a plan sponsor does not act as a fiduciary when it makes changes to its plan. In *Hughes*, the appellants contended that the amendment process amounted to a sham transaction, because the plan's participants and beneficiaries had a more significant equitable interest in the underlying plan assets. Flatly rejecting that view, this Court broadly asserted in a plurality opinion that:

> In general, an employer's decision to amend a pension plan concerns the composition or design of the plan itself and does not implicate the employers' fiduciary

> duties which consist of such actions as the administration of the plan's assets. [Citation omitted.] **ERISA's fiduciary duty requirement simply is not implicated where** Hughes, acting as **the plan's settlor, makes a decision regarding the form or structure of the plan such as who is entitled to receive plan benefits** and in what amounts, or how such benefits are calculated.

Id. at [*22] (emphasis added).

In the case below, Goodrich made the decision to split its pension and welfare benefit plans into two almost equal parts because it was splitting its business into two almost equal parts. Such split-ups invariably require a plan sponsor to separate out single plan populations into two separate plan populations. Goodrich thus was compelled to decide — and did decide — which participants and beneficiaries would be covered by each of the two plans. Petitioners simply ended up being covered by those pension and welfare plans (and plan liabilities) transferred to and assumed by (then) UGTC. Such plan "form or structure" decisions fall squarely within the broad definition of settlor activity just announced by this Court in *Hughes*.

Petitioners already have an answer to their contention that Goodrich's actions amount to fiduciary activity: that answer was provided by this Court in *Hughes*. Accordingly, The Petition for Writ of Certiorari should be denied.

C. Petitioners' Attempt to Argue Contract Assignment Principles Does Not Square With ERISA's Regulatory Scheme.

Petitioners' contention that the very act of transferring welfare plan obligations constitutes fiduciary conduct rests on the premise that a plan participant can be removed from a welfare benefit plan only with his consent — apparently, even if the participant has no vested right to benefits under the plan. Compare *Howe II*, 36 F.3d

at 752 (affirming that the retirees have no contract claims because they lack vested plan rights) with *Howe II*, 36 F.3d at 756 (employer breached its duty in the manner in which transfers occurred). A review of ERISA's regulatory scheme, and established trust law principles, makes clear that Petitioners' attempt to impose a contract/assignment obligation on Goodrich is wholly inconsistent with ERISA and without other precedent.

This Court has long held that ERISA "abounds with the language and terminology of trust law." *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989). That view supports and explains why this Court recognized the deferential, arbitrary and capricious standard used to review discretionary acts of properly empowered fiduciaries. *Firestone*, 489 U.S. at 111. That view also supports and explains why this Court in *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 253 (1993), held that ERISA's remedies are essentially equitable in character, and why this Court in *Howe v. Varity Corp.*, 516 U.S. 489 (1996), recognized that the process of communicating and explaining the terms of an employee benefit plan to its participants and beneficiaries generally constitutes a fiduciary act under ERISA. Finally, this Court repeatedly casts the sponsor of an employee benefit plan in the role of the settlor. *E.g.*, *Firestone*, 489 U.S. at 111-112; *Schoonejongen*, 514 U.S. at 79, 82.

ERISA's statutory framework recognizes the different roles played by the original promisor and the third party entrusted with carrying out the underlying promise. Under traditional trust law, the trust settlor and the trustee assume these roles, respectively; the trustee's undertaking commences as soon as the trust is declared and the settlor's instructions are provided to the trustee. Restatement (Second) of Trusts, §§ 4, 331.[4] ERISA maintains a

4. For most ERISA-regulated employee benefit plans, the plan thus takes the form of a self-settled trust. More formalized and funded employee benefit plans, such as employee pension benefit plans, clearly identify the dividing line in documentation. For unfunded employee welfare benefit plans, identifying the dividing line invariably is more circumspect.

closely analogous scheme: it treats the "plan" as the manifestation of the settlor's intent, and directs participating employees and third parties to look to their plan — rather than to their employer — for payment of their benefits and related claims *by making the plan the obligor*, similar to the way a *cestui que trust* looks to the trust — and not the settlor — for whatever benefits they might reasonably receive.

That is why employee benefit plans can sue and be sued under ERISA as entities, 29 U.S.C. § 1132(d)(1), as this Court recognized long ago in *Mackey v. Lanier Collection Agency & Serv.*, 486 U.S. 825 (1988). That also is why judgments against plans can be enforced only against the plans themselves and cannot be enforced against any other persons unless liability is established against those other persons in their individual capacities. *Id.* at 832.[5] Also 29 U.S.C. § 1132(d)(2). Further, that is why numerous courts have rejected suits for plan benefits that were brought solely against employers, rather than against the plans obliged to pay them. A long list of federal appeals courts decisions — including the Eighth Circuit's recent decision in *Hall v. LHACO*, 140 F.3d 1190 (8th Cir. 1998) — support the principle that the plan is the real obligor, not the plan sponsor.[6]

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5. As this Court explained in *Mackey*:

> At the outset, we consider the several types of civil suits that can be brought against ERISA welfare benefit plans. First, ERISA's § 502 provides that civil enforcement actions may be brought by particular persons against ERISA plans to secure specified relief, including the recovery of plan benefits.

Mackey, 486 U.S. at 832.

6. *E.g.*, *Riordan v. Commonwealth Edison Co.*, 128 F.3d 549, 551 (7th Cir. 1997) (only plan can be sued for benefits); *Lee v. Burkhart*, 991 F.2d 1004, 1009 (2d Cir. 1993) (same); *and Madden v. ITT Long Term Disability Plan*, 914 F.2d 1279, 1287 (9th Cir. 1990) (same), *cert. denied*, 498 U.S. 1087 (1991). *See Garren v. John Hancock Mut. Life Ins. Co.*, 114

(Cont'd)

Finally, that is why ERISA broadly defines the role of "plan sponsor," 29 U.S.C. § 1002(16)(B), and implicitly permits one plan sponsor to be substituted for another — without requiring any amendment or modification of the underlying employee benefit plan documents (assuming the plan language defines the sponsor broadly as do many plan documents). All ERISA requires is that a plan sponsor be a person[7] that is "acting directly as an employer, **or indirectly in the interest of an employer**, in relation to an employee benefit plan." 29 U.S.C. § 1002(5) (emphasis added).[8] ERISA contains no prohibition against sponsor-initiated plan amendments or sponsor substitutions, and Petitioners have not identified any statute or rule indicating otherwise.

Given the foregoing, it is clear that Petitioners make far too much of the Eighth Circuit's commentary in *Howe II*. A finding that a plan sponsor (there, M-F; here, Goodrich) has a direct "obligation . . . to the individual retirees," *Howe II*, 36 F.3d at 756, ignores the role played by the employee benefit plan in ERISA's statutory scheme. Accordingly, Petitioners' attempt to raise traditional state law concepts — presumably, in the context of federal common law — should be ignored and their Petition for Writ of Certiorari should be denied.

(Cont'd)

F.3d 186 (11th Cir. 1997) (both plan and fiduciary can be sued for benefits, so long as relief indicates who is liable); *Mitchell v. Eastman Kodak Co.*, 113 F.3d 433 (3d Cir. 1997) (same); and *Daniel v. Eaton Corp.*, 839 F.2d 263, 266 (6th Cir.) (same), *cert. denied*, 488 U.S. 826 (1988).

7. ERISA even defines a "person" broadly, to include individuals, partnerships, joint ventures, corporations, mutual companies, trusts, estates, associations, and similar beings. 29 U.S.C. § 1002(9).

8. Compare 29 U.S.C. § 1002(16)(B) (defining "plan sponsor" as an "employer" in single employer plan situations) with 29 U.S.C. § 1002(5) (defining employer broadly, to include those acting indirectly).

II. THE PETITION SHOULD BE DENIED BECAUSE PETITIONERS MISREAD AND OVERSTATE THE SIXTH CIRCUIT'S HOLDING THAT PETITIONERS' RIGHTS DID NOT VEST. CONTRARY TO PETITIONERS' CONTENTION, THE SIXTH CIRCUIT'S DECISION IS CONSISTENT WITH DECISIONS BY THIS COURT AND OTHER CIRCUIT COURTS.

Petitioners also seek this Court's review by broadly alleging that the Sixth Circuit, below, established an "almost irrebuttable presumption against vesting [that] is contrary to the law of other circuits." (Pet. at 22.) Petitioners misrepresent the Sixth Circuit's holding, and conveniently overlook numerous other appeals court decisions that broadly support the Sixth Circuit's position below by subjecting litigants seeking "lifetime" medical benefits to an equally rigorous standard.

In *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73 (1995), this Court established the framework for lower courts required to consider the "vesting" question in a welfare benefit plan regulated by ERISA. Since this Court's decision in *Schoonejongen* the federal courts of appeal have looked to see whether a commitment can be found rather than simply assuming that such a commitment exists. Merely because Petitioners are unhappy with the state of the law is no reason for this Court to take this case.

A. The Sixth Circuit's Decision is Not Contrary to Decisions by Other Circuits or Prior Sixth Circuit Decisions.

The Sixth Circuit's opinion, below, belies Petitioners' contention that the holding in this case is contrary to the law espoused in the other circuits. For example, in its opinion the *Sengpiel* court explicitly embraced the standard adopted by the Fifth Circuit Court of Appeals in *Wise v. El Paso Natural Gas Co.*, 986 F.2d 929, 937 (5th Cir.), *cert. denied*, 510 U.S. 870 (1993).

(Pet. App. A at 13a-14a.) More important, the Sixth Circuit's opinion below reveals that in *Sengpiel* the Sixth Circuit followed and applied a case this Court recently declined to hear: the Sixth Circuit's *en banc* decision in *Sprague v. General Motors Corp.*, 133 F.3d 388 (6th Cir.) (en banc), *cert. denied*, 118 S. Ct. 2312 (1998).

Contrary to Petitioners' contention, it now is well settled that ERISA does not impose any vesting requirement on employee welfare benefit plans. Rather, welfare benefits vest only if provided by contract. *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995). *See Wise*, 986 F.2d at 934-35. While such a "contract" commitment can be made under a collective bargaining agreement, the rule remains clear and absolute: the contractual commitment to provide benefits for life must be found — somewhere — before it can be enforced. *Anderson v. Alpha Portland Indus., Inc.*, 836 F.2d 1512, 1516 (8th Cir. 1988), *cert. denied*, 489 U.S. 1051 (1989); *Int'l Ass'n of Machinists v. Masonite Corp.*, 122 F.3d 228, 231 (5th Cir. 1997); and *American Fed. of Grain Millers v. Int'l Multifoods Corp.*, 116 F.3d 976, 979 (2d Cir. 1997) (all, rejecting welfare benefit plan vesting claims based on inference).

The standard applied by the Sixth Circuit in *Sengpiel* — that an employer's intent to vest must be based on evidence drawn from the governing plan documents — thus is fully consistent with all retiree medical benefits cases decided after this Court handed down *Schoonejongen* in 1995. An employee who attempts to prove vesting bears the burden of proof. An examination of the cases Petitioners cite in support of their petition illustrates this point.

B. Petitioners Ignore the Fact That Lower Court Holdings Issued After This Court Decided *Curtiss-Wright Corp. v. Schoonejongen* Have Adopted a Presumption That Retiree Welfare Rights Do Not Vest.

In their brief, Petitioners concede that both the district court and the Sixth Circuit broadly rejected Petitioners' claim of a vested

right to lifetime medical and life insurance benefits under the Goodrich plans.[9] (Pet. at 12, 13.) Petitioners nonetheless contend that the Sixth Circuit's conclusion lacks any judicial support, and assert that the standard used by the Sixth Circuit below is inconsistent with the standard being used by all other appellate courts. (Pet. at 22.) Petitioners grossly misstate the Sixth Circuit's holding, and the state of the law in the other appellate circuits.

First and foremost, Petitioners cannot credibly rely upon cases decided before this Court handed down *Curtiss-Wright Corp. v. Schoonejongen* in 1995. *Schoonejongen* prompted the lower courts to generally re-examine the relationship between a welfare benefit plan's operative provisions and the plan sponsor's reserved right to amend or modify the plan, notwithstanding the operative language. That is why the appellate courts that have reconsidered lawsuits brought by retirees after *Schoonejongen* have concluded that a plan sponsor's broadly reserved right to amend or modify the plan can be used to amend or modify all of the plan's terms — even those that purport to create ongoing, lifetime benefits. In addition, that is why the Sixth Circuit in *Sprague v. General Motors Corp.*, 133 F.3d 388 (6th Cir.) (en banc), *cert. denied*, 118 S. Ct. 2312 (1998)), rejected retirees' vesting claims based on both the plan's operative provisions and administrative practices: because the underlying plan preserved the plan sponsor's right to alter all of the plan's terms.

That also is why the Seventh Circuit in *Frahm v. The Equitable Life Assur. Soc'y*, 137 F.3d 955 (7th Cir.), *cert. denied*, 119 S. Ct. 55 (1998), rejected the retirees' "vesting" arguments, which were based on plan practices that were not grounded in the plan's governing language. Excerpts from the Seventh Circuit's opinion

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9. Compare Pet. at 12 ("On petitioners' contract-based claim the court held that petitioners could be successful only if their benefits vested at retirement at the level of coverage they were now claiming") with Pet. at 12 ("The Sixth Circuit also agreed with the district court that the retirees' welfare benefits were not vested.")

in *Frahm* illustrate this fundamental change in how the lower courts now approach welfare benefit plan "vesting" questions after *Schoonejongen*:

> ERISA provides that [benefit] plans must be established in writing, *see* 29 U.S.C. § 1102(a)(1), which is a long way toward a statute of frauds -- as is the Supreme Court's observation that under ERISA "every employee may, on examining the plan documents, determine exactly what his rights and obligations are under the plan." *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 83 (1995). Although § 1102(a)(1) does not cover all possible ground — it leaves open, for example, the possibility that a written plan may be combined with an oral promise, such as an undertaking to give a worker twice the benefits so established — **the utility of reducing retirement promises to writing and avoiding arguments about who said what to whom are so fundamental to both ERISA and contract law that an extension of the writing requirement to all long-term commitments is an inescapable ingredient of the federal common law slowly accumulating in ERISA's shadow.** *Sprague* [*v. General Motors Corp.*] made this extension, and sensibly so. *Cf. Mohr v. Metro East Mfg. Co.*, 711 F.2d 69 (7th Cir. 1983) (departure from terms of a collective bargaining agreement permissible only if in writing). All ten judges who sat *in Bidlack* [*v. Wheelabrator Corp.*, 993 F.2d 603 (7th Cir. 1993)] relied on writings; none suggested that a wholly oral promise could require the employer to provide lifetime benefits.

Frahm, 137 F.3d at 958 (emphasis added). The logic behind such a conclusion is apparent: if welfare benefit plan commitments only

contractually vest, a court can only hold a plan sponsor to a 20-year to 40-year commitment if the commitment has been clearly and carefully made.

Second, Petitioners' attempt to rely on cases that involve the interpretation of a collective bargaining agreement is misplaced because the interpretation of a collective bargaining agreement (i.e., the underlying commitment) invariably involves different legal principles.[10] Pet. at 22-25 (citing *United Steelworkers v. Textron, Inc.*, 836 F.2d 6 (1st Cir. 1987) (interpretation of a Steelworkers' bargaining agreement); *Keffer v. H.K. Porter Co.*, 872 F.2d 60 (4th Cir. 1989) (interpretation of a Steelworkers-negotiated shutdown agreement); *United Paperworkers Int'l Union v. Champion Int'l Corp.*, 908 F.2d 1252 (5th Cir. 1990); *Bower v. Bunker Hill Co.*, 725 F.2d 1221 (9th Cir. 1984) (interpretation of a Steelworkers-negotiated shutdown agreement); *Diehl v. Twin Disc, Inc.*, 102 F.3d 301 (7th Cir. 1996) (interpretation of a UAW-negotiated shutdown agreement); *Int'l Ass'n of Machinists v. Masonite Corp.*, 122 F.3d 228 (5th Cir. 1997) (interpretation of a Machinists-negotiated bargaining agreement); and *Stewart v. KHD Deutz of Am. Corp.*, 980 F.2d 698 (11th Cir. 1993) (interpretation of a UAW-negotiated bargaining agreement)).

Retiree welfare benefit "vesting" rights that arise under a collective bargaining agreement profoundly differ from those that arise solely under a welfare benefit plan. A collective bargaining agreement gives a court a second contract to examine when determining whether an employer intended that retirees would acquire vested rights for life. A collective bargaining agreement also presents special circumstances not found when rights arise —if at all — solely under a welfare benefit plan. A bargaining agreement creates a tripartite relationship between: (1) the

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10. As noted generally above, virtually all of the cases Petitioners cite, including the collective bargaining agreement cases, were decided prior to this Court's decision in *Schoonejongen*, and therefore are of questionable precedential value.

employer; (2) the union; and (3) a class of third party beneficiaries that always includes bargaining unit employees and only sometimes includes retired employees who no longer are part of the bargaining unit.

Because unions can and frequently do negotiate on behalf of both future retirees and current retirees, *Allied Chemical & Alkali Workers Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 181, n.20 (1971), it frequently is unclear whether a union has bargained for both future retirees and already-retired employees whose plan rights are subject to termination, or whether the union has not been bargaining for already-retired employees because they have continuing rights that arise under one or more prior bargaining agreements. *Cf. Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 207-08 (1991).

Even a cursory examination of more recent appeals court decisions involving collectively bargained retiree medical benefits reveals these obvious — and distinguishing — ambiguities. *See Golden v. Kelsey-Hayes Co.*, 73 F.3d 648, 655 (6th Cir.) (discussing role played by *Litton* in determining whether retirees' rights continued despite the expiration of the underlying collective bargaining agreement), *cert. denied*, 519 U.S. 807 (1996); and *Int'l Ass'n of Machinists v. Masonite*, 122 F.3d at 233 (same). As the Fifth Circuit pointedly observed in *Masonite*:

> In the absence of the CBAs, the Plan's reservation-of-rights clause granting the company the right to amend or terminate the Plan might well end the inquiry in the company's favor.

Masonite, 122 F.3d at 233.

Even if the bargaining agreement cases cited by Petitioners did have some bearing on how the lower courts have been applying and construing *Schoonejongen*, most courts now examine the bargaining agreement to find clear signs of an affirmative commitment; inferences no longer are sufficient. *E.g.*, *United*

Paperworkers Int'l Union v. Champion Int'l Corp., 908 F.2d 1252 (5th Cir. 1990); *Int'l Ass'n of Machinists v. Masonite Corp.*, 122 F.3d 228 (5th Cir. 1997). *See espec. American Fed. Of Grain Millers v. Int'l Multifoods Corp.*, 116 F.3d 976, 979 (2d Cir. 1997) ("The rule under section 301 is similar — after a CBA expires, an employer generally is free to modify or terminate any retiree medical benefits that the employer provided pursuant to that CBA."); and *Bidlack v. Wheelabrator Corp.*, 993 F.2d 603, 606 (7th Cir. 1993) (*en banc*) ("[O]rdinarily when a contract expires, it — expires. It is at an end . . . a court should cast a cold eye on contentions that a contract with a fixed term actually created a perpetual obligation"), *cert. denied*, 510 U.S. 909 (1993).

Third, neither of the pre-*Schoonejongen* non-bargaining-agreement cases cited by Petitioners alters or undermines this principle. In *Alexander v. Primerica Holdings, Inc.*, 967 F.2d 90 (3d Cir. 1992), for example, the Third Circuit concluded that the plan's language that was found to be ambiguous, probably because the language implied that the benefits would remain in effect at least until the retiree died. (Pet. at 24-25.) *Id.* at 91-92. The language in *Jensen v. SIPCO, Inc.*, 38 F.3d 945, 950 (8th Cir. 1994), *cert. denied*, 514 U.S. 1050 (1995) was more blatant, and undermined the very premise on which this Court decided *Schoonejongen*: that a plan sponsor can amend, modify or terminate a plan it sponsors if it has reserved the right to do so. In *Jensen*, the SIPCO plan provided that "benefits will be provided until the retiree dies. . . ." (Pet. at 25.) More important, though, the SIPCO plan restricted the sponsor's right to amend or modify the plan, by specifying that amendments generally would "not be applicable to persons who [were] receiving pensions . . . prior to the effective date of such amendment." *Id.* at 948-50.[11] In both cases, the appeals courts

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11. Additionally, the Eighth Circuit in *Jensen* found that the plan language was ambiguous, not that the language evidenced a commitment to lifetime benefits, as Petitioners contend. *Id.* Notably, the Eighth Circuit (Cont'd)

were not in a position to presume that the employers were "**generally free** under ERISA . . . to adopt, modify or terminate [the] welfare plan[ ]," *Schoonejongen* 514 U.S. at 78 (emphasis added), because the sponsor had expressly limited its right to make plan modifications that affected already retired employees.

The one post-*Schoonejongen* non-bargaining agreement case cited by Petitioners presents facts almost identical to those found in *Jensen*, and thus is clearly distinguishable from the facts in this case. In *Barker v. Ceridian*, 122 F.3d 628 (8th Cir. 1997), the Eighth Circuit held that — consistent with the standard adopted by the Sixth Circuit below — clear plan language was needed to support the retirees' contention that their benefits would not be cut off by a plan termination. *Id.* at 635. The appeals court nonetheless found that the disability retirees were vested, but only because the plan's reservations-of-rights language specifically protected the disability retirees from a cutoff in benefits if the plan terminated. The language used in the Ceridian plan left little room for doubt that the plan sponsor had partially surrendered its right to amend, modify or terminate:

> If the group Long-Term Disability Plan terminates, and if on the date of such termination you are totally disabled, your Long-Term Disability benefits and your claim for such benefits will continue as long as you remain totally disabled as defined by the plan.

Id. at 631.

In sum, Petitioners' contention that the Sixth Circuit is alone in its views is fundamentally incorrect and should be disregarded. This is a "contract" case that Petitioners lost on the facts. Accordingly, the Petition for Writ of Certiorari should be denied.

(Cont'd)

recently held in *Bierman v. Pirelli Armstrong Tire Corp.*, 1998 U.S. App. LEXIS 16398 (8th Cir.; July 17, 1998) (unpubl.), that vesting could not simply be inferred under a welfare benefit plan — and cited *Jensen* in support of that proposition.

CONCLUSION

Petitioners were found to not have a vested, enforceable right to lifetime medical benefits. Accordingly, any continuing benefits they received from Goodrich (or from any transferee of Goodrich) constituted an act of forbearance by Goodrich. Such forbearance hardly constitutes a breach of fiduciary duty. The Eighth Circuit's actual holding in *Howe II* is not to the contrary.

There is no split between the circuit courts of appeal. This case does not present issues potentially affecting retirees across the country, just Petitioners and those other retirees transferred by Goodrich to the employee welfare benefit plans now sponsored and maintained by Michelin. For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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FILED
FEB 8 1999
CLERK

No. 98-950

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

GLEN H. SENGPIEL, DONALD E. KELLY
and DONALD R. GOTTSCHALK,

Petitioners,

vs.

THE B.F. GOODRICH COMPANY, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT B.F. GOODRICH COMPANY'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether The B.F. Goodrich Company's decision to make ministerial changes to its welfare benefits plans in accordance with a decision to transfer its tire division to a newly-created company (*e.g.*, transfer responsibility for the retirement welfare benefits of certain corporate employees to the new company) constitutes a fiduciary act within the meaning of ERISA and, if so, whether B.F. Goodrich breached any fiduciary duty in transferring responsibility for these benefits.

2. Whether a triable issue of fact exists over the allegation that B.F. Goodrich promised to provide lifetime welfare benefits to its retirees.

RULE 29.6 STATEMENT

In accordance with Supreme Court Rule 29.6, the B.F. Goodrich Company advises the Court that B.F. Goodrich does not have a parent company and has the following nonwholly owned subsidiaries:

DTM Corporation
DTM GmbH
BFGoodrich - Messier, Inc.
Messier-BFGoodrich S.A.
Telenor S.A.
Port Systems, L.L.C.
Goodrich Holding Corporation
Taysung Enterprises Co., Ltd.
Rohr, Inc.
Rohr Aero Services - Asia Pte. Ltd.
BFGoodrich China, Inc.
Youli Piping Co. Ltd.
Transportation Insurance Limited
Tortuga Casualty Co.
United Insurance Co.
Freedom Chemical Diamalt Beteiligungs GmbH
Chongqing Diamalt Biochemical Co. Ltd.
BFGoodrich Diamalt GmbH
HackerMalt Proteine Verwaltungs GmbH
HackerMalt Proteine GmbH & Co.
Lyomark Pharma GmbH
Srinivasa Cystine Limited
Indiamalt Pvt. Ltd.
Yantal Prince Chemical Co. Ltd.

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STATEMENT

Three retired employees of The B.F. Goodrich Company ("BFG") claim that their employer violated the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001, *et seq.*, (1) by transferring responsibility for their welfare benefits to a newly-created joint venture, now owned by Michelin, that was spun off from BFG, and (2) by breaking alleged promises not to reduce their welfare benefits. A unanimous panel of the Sixth Circuit (Suhrheinrich, Daughtrey, *McKeague*) rejected plaintiffs' claims in their entirety, as did the district court (Dowd) before it.

The Sixth Circuit determined that under the facts and circumstances of this case BFG's 1986 decision to divest its tire division, along with its decision to transfer responsibility for welfare benefits of designated employees to the newly-created entity, did not constitute a "fiduciary" act within the meaning of ERISA. The panel next concluded that even if the divestiture did constitute a fiduciary act, BFG did not breach any fiduciary duty in implementing the decision. The panel finally concluded that there was insufficient evidence to show that the company ever promised plaintiffs vested and unchangeable welfare benefits. Each of these factbound decisions, resting on settled legal principles previously accepted by this Court, does not warrant further review.

1. Plan Documents.

Prior to the passage of ERISA, BFG had several benefits program. In 1972, it distributed brochures to employees describing the programs it offered for major medical insurance, hospitalization and surgical, pension, life insurance, and prescription drugs. None of the plans promised lifetime benefits, and the major medical plan expressly reserved BFG's right to modify or discontinue the benefits provided.

In 1977, in the aftermath of the enactment of ERISA, BFG prepared the company's first summary plan descriptions. It distributed the descriptions to all employees along with an opening brochure, entitled "Highlights," which summarized the hospitalization, major medical, life insurance and other benefits programs. Neither the Highlights booklet nor any of the individual summary plan descriptions promised vested or unchangeable welfare benefits. And the Highlights booklet explicitly contained the following reservation of rights: "While the Company expects to continue these benefits indefinitely, it reserves the right at its option to change or discontinue any or all of the programs at any time." Pet. App. 4a.

In 1981, BFG distributed revised summary plan descriptions and a Highlights booklet to its employees. Again, none of the offerings promised lifetime welfare benefits, and the Highlights booklet specifically included the prior reservation-of-rights clause.

In 1986, BFG sent a new summary plan description for the Retiree Health Care Plan to all retirees. It contained the following reservation: "The BFGoodrich Company expects to continue the Health Care Plan indefinitely but reserves the right to amend, suspend or terminate the Plan at any time." Pet. App. 4a-5a.

That same year, BFG and Uniroyal Tire Company decided jointly to divest their tire operations to create a new company called Uniroyal Goodrich Tire Company ("UGTC"). As part of the plan, BFG and Uniroyal agreed to own UGTC in equal parts and to transfer all assets and liabilities of their tire divisions to the new company. Among the transferred liabilities were the pension and welfare-benefit obligations of BFG to its tire-related retirees. Besides transferring liability for the pension and welfare benefits of retirees who worked solely in the tire division, BFG also transferred the benefits liabilities for a proportionate percentage of its corporate staff

retirees. Before the divestiture, BFG's corporate staff serviced its tire, chemical, rubber, aerospace and plastics operations, and performed other operations that benefitted the company as a whole.

Finding that it "was impossible to determine which [corporate] retirees had worked most closely with the tire division throughout the course of their careers," Pet. App. 5a, BFG had to develop a method for assigning certain corporate retirees to the new company. It ultimately selected a random percentage of corporate retirees, equivalent to the relative percentage of BFG's tire-related business, and transferred their benefit liabilities to the newly-created entity. Ultimately, BFG transferred about 42% of its corporate retirees and their welfare benefits to the new entity, and did so by randomly dividing employees based on their social security numbers. The joint-venture agreement required UGTC to "assume all liability of Goodrich and Uniroyal for benefits under their present or past welfare plans or those of their predecessors for active, former and retired employees of the Goodrich Tire Business or the Uniroyal Tire Business." Pet. App. 6a.

2. BFG Modifies Its Welfare Benefits.

In 1990, BFG modified the welfare benefits of its retirees by increasing their medical plan deductibles and copayment maximums. These cost increases did not apply to retirees from the tire division that had been spun off to create UGTC, or to the BFG corporate employees who had been assigned to the UGTC welfare benefit plans. None of the retired employees of BFG, still covered by its welfare benefits plans, filed a lawsuit or administrative complaint challenging the modification.

3. UGTC Modifies Its Welfare Benefits.

In 1995, UGTC modified its retiree welfare benefits as well. Much like BFG five years earlier, the company increased its

medical plan deductibles and copayment maximums. In addition, it altered the life insurance, prescription drug, and Medicare reimbursement benefits. *See* Pet. App. 7a n.3. The modifications applied to the transferred retirees from BFG's tire division and to the transferred corporate employees that by then had become the responsibility of UGTC.

4. Plaintiffs' Claims.

Plaintiffs are three BFG retirees who formerly held salaried positions in the company. Glen H. Sengpiel retired in 1976 from his position as Corporate Director of Employee Relations. Donald R. Gottschalk retired in 1981 from his position as Corporate Employee Relations Representative. And Donald E. Kelly retired in 1982 from his position as Foreman in plant cleaning for tire operations.

On February 13, 1996, plaintiffs brought suit against BFG, UGTC, UGTC's successor, Michelin North America, and the benefits plans of BFG and UGTC. They made two claims pertinent here: (1) that BFG's transfer of its benefits obligations to UGTC breached its fiduciary duties under ERISA, and (2) that the transfer breached a promise to pay vested and unchangeable retirement benefits.

5. The Decisions Below.

The district court rejected both claims, granting summary judgment to the defendants. It concluded that BFG did not act in a fiduciary capacity when it transferred the welfare plan liabilities to UGTC and therefore that ERISA's fiduciary requirements did not apply. The court further concluded that the lifetime-benefits claims failed because plaintiffs' welfare benefits did not vest at any particular level at the time of their retirement.

The Sixth Circuit affirmed in each respect. It found that BFG's decisions to divest the tire division, to transfer responsibility for the welfare benefits of the tire division

retirees to UGTC and to include a representative percentage of corporate employees in the transfer did not constitute fiduciary acts under ERISA. The latter transfer, the court concluded, amounted to the "ministerial application of a percentage classification to implement its business decision" to divest the tire division and was "simply not the kind of plan management or administration that trigger[s] ERISA's fiduciary duties." Pet. App. 11a. In the alternative, the court found that even if the transfer decisions constituted fiduciary acts, the record evidence all established that they were done in good faith. The court likewise found that on the record of this case, plaintiffs could not establish a cognizable contract-based claim. Concluding that "the plan documents in this case do not express a clear and affirmative intent to vest employees' welfare benefits," Pet. App. 14a, the court rejected the claim as a matter of law.

REASONS FOR DENYING THE PETITION

I. The Sixth Circuit's Fiduciary-Duty Decision Applies Settled Law To The Unique Facts Of This Case And Does Not Conflict With Prior Decisions Of This Court Or Any Other Court.

The Sixth Circuit's fiduciary-duty decision represents a factbound interpretation of settled law. Because the court's interpretation of "fiduciary acts" carefully follows precedent from this Court, because it does not meaningfully conflict with any other lower court decisions, and because in any event the court alternatively concluded that no fiduciary duty was breached, the decision does not warrant review.

A. The Sixth Circuit's Decision Is Correct.

To begin with, the court of appeals' analysis is accurate and adheres to precedent from this Court. Section 404 of ERISA identifies certain limited fiduciary duties that govern the management of welfare benefit plans. 29 U.S.C. § 1104(a)(1)

(a "fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and their beneficiaries"). These fiduciary obligations attach, however, only to employers' activities that involve "the exercise of discretionary authority or control over plan management or administration." *Lockheed Corp. v. Spink*, 517 U.S. 882, 890 (1996) (quotation omitted); *see* 29 U.S.C. § 1002(21)(A). While such duties therefore apply to the administration or management of welfare benefits, they do not apply to decisions relating to benefit plan "design" such as the formation, amendment or termination of plans. *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78-80 (1995) (a company does not act as a fiduciary in amending or terminating a welfare plan). *See id.* at 78 ("Employers or other plan sponsors are generally free under ERISA for any reason at any time, to adopt, modify, or terminate welfare plans."). *See also Spink*, 517 U.S. at 891 ("the act of amending a pension plan does not trigger ERISA's fiduciary provisions"); *Hughes Aircraft Co. v. Jacobson*, No. 97-1287, 1999 WL 24546 (U.S. Jan. 25, 1999) (same).

The Sixth Circuit carefully adhered to this framework. BFG's transfer of its retirees' welfare benefits, it concluded, more closely resembles a decision to modify, amend or terminate a plan than it does to administering one. Plaintiffs, notably, go a long way to conceding the point. They "agree" that "Goodrich's decision to divest its tire division is a business decision not subject to ERISA's fiduciary standards." Pet. 16. For the same reason that such decisions do not rise to the level of a "discretionary" fiduciary act, neither do the necessary ministerial acts that follow from such decisions, including the need to identify the employees whose welfare benefits will be the responsibility of the new company. ERISA simply was never designed to regulate such decisions, particularly when the challenged acts spring from the

implementation of a concededly legitimate business transaction.

B. There Is No Lower-Court Conflict Of Authority.

Unable to counter the accuracy of the Sixth Circuit's and district court's uniform conclusions on this score, plaintiffs resort to arguing (Pet. 14-16) that the decisions create a shallow conflict of lower-court authority. Their effort is manufactured and in the end wrong. The single citation on which they rely, *Howe v. Varity*, 36 F.3d 746, 756 (8th Cir. 1994), *aff'd on other grounds*, 516 U.S. 489 (1996), simply does not live up to its billing.

Far from establishing a lower-court conflict, *Howe*'s one-paragraph analysis identifies the outer boundaries of the legal framework within which the Sixth Circuit worked. The case involved a corporation's blatant "scheme . . . to rid" itself of the "obligations to pay benefits to retirees" by creating an "essentially bankrupt" company to handle these and other obligations and to take over a declining combine and tractor line. 36 F.3d at 750 (quoting district court's findings of fact). At the time of the transfer of retiree obligations, the company knew that the new subsidiary had more debts than assets and had no chance of success. *Id.* at 749-50. The retired employees were not told of the transfer at the time it occurred, and only learned of it two years later when the newly-created entity went into receivership and they stopped receiving welfare benefits. *Id.* at 755-56.

BFG's actions have no tenable parallel to the circumstances of *Howe*. Unlike the factual findings of the Eighth Circuit, the Sixth Circuit concluded that "[t]here is nothing in the record to suggest that BFG was motivated by bad faith or self-dealing considerations." Pet. App.12a. In contrast to the *Howe* subsidiary, the BFG joint venture created a financially sound company, one that was healthy when formed in 1986 and one that has remained so ever since, including in its new capacity

as part of the well-established French tire manufacturer, Michelin. In contrast to *Howe*'s conclusion that the company had "contractually created duties" to the employees, the Sixth Circuit found that no such contractual duties existed. Pet. App. 15a ("plaintiffs' benefits were never vested"). And while the *Howe* retirees' welfare benefits were abruptly terminated when the new entity went into receivership, plaintiffs here continue to receive the same welfare and pension benefits they had at the time of transfer: vested pension benefits and changeable, non-vested welfare benefits.

In the final analysis, *Howe* does not establish a pertinent conflict with the Sixth Circuit's decision. It merely confirms that while business decisions to divest a part of a company generally do not constitute fiduciary acts, such decisions may implicate fiduciary duties when carried out in a particularly egregious manner or when done in bad faith. Notably, plaintiffs have not identified any other courts of appeals decisions or a single decision from this Court that supports their interpretation of *Howe*'s inscrutable, single-paragraph analysis. Indeed, since *Howe* and since the decision below, the D.C. Circuit has followed the Sixth Circuit's fiduciary duty analysis in a setting almost identical to this one. *See Systems Council EM-3, Int'l Brotherhood of Electrical Workers, AFL-CIO v. AT&T Corp.*, 159 F.3d 1376, 1379-80 (1998) (concluding that AT&T did not act in a fiduciary capacity when it transferred its equipment business to Lucent and transferred responsibility for its welfare benefits plans to Lucent). On this record, *Howe* ultimately represents the exception that proves the rule, and certainly fails to create the kind of lower-court conflict that deserves this Court's attention.

C. The Sixth Circuit Alternatively Concluded That No Fiduciary Duty Was Breached.

But even if the petition implicated a square conflict, which it does not, it represents an exceedingly poor vehicle for addressing this issue. The Sixth Circuit also concluded that even if a fiduciary duty existed, none was breached. Pet. App. 12a-13a. Plaintiffs accordingly cannot obtain relief save through a factbound inquiry, in the context of a complex and lengthy record, into allegations that BFG breached a fiduciary duty.

This question plainly falls short of meeting the customary requirements for granting the writ, most notably Rule 10's double-barreled admonition that a petition is "rarely granted" when the alleged error consists of (1) "erroneous factual findings" or (2) "the misapplication of a properly stated rule of law." Sup. Ct. R. 10. Plaintiffs' contention ultimately comes to nothing more than that. At most plaintiffs ask the Court to draw different factual inferences from the circumstances leading to BFG's divestiture of the tire division than the lower courts did or to apply ERISA's fiduciary duty requirements in a manner different from the lower courts.

What is more, the factual inferences that plaintiffs ask the Court to draw are not the right ones and indeed have utterly no support in the record. Plaintiffs baldly allege (Pet. 19) that the transfer of the corporate group retirees was "an integral part of Goodrich's attempt to shift its liability to its successor in interest." No such conspiracy existed, however. In point of fact, the transferred employees initially benefitted from the change because in 1990 BFG increased the deductibles for medical insurance and copayment maximums for its retirees, a development that did not cover retirees assigned to UGTC. Not until 1995, nine years after the spin-off transaction, did UGTC even increase some of these costs and therefore in any way burden plaintiffs. Not one shred of evidence indicates that

UGTC (now Michelin) will ultimately be a less secure provider of retiree welfare benefits than BFG was. Still less does the evidence show that BFG would have been a *more* secure provider of retiree welfare benefits if, as plaintiffs now request, it had been saddled with responsibility for all retirees of the tire division, corporate or otherwise, after the spin-off of the division.

Nor have plaintiffs shown a more feasible way to carry out BFG's business decision with respect to its corporate employees. They do not challenge BFG's position that there was no reasonable way to determine the corporate employees who had worked primarily with the tire division in view of the seamless allocations of responsibility among them. All they do is tepidly suggest (Pet. 20) that "[a] fair method would have been to transfer 42.54% of all Corporate Group retirees' obligations to UGTC and for Goodrich to retain 57.46% of the group's obligations." But this hopelessly confusing approach could not possibly be in plaintiffs' or BFG's interest. It would lead to dual sets of benefits procedures that no retiree, medical insurance provider or doctor could ever decipher. Neither the text of ERISA nor the cases decided under it support such an awkward approach, to say nothing of compel it.

Plaintiffs also have not identified any case support for their position (Pet. 19) that every business transaction, no matter how complex, must be undertaken "solely for the benefit" of plan participants. *Howe* does not support such a wide-ranging approach, but instead simply illustrates that a bad-faith transaction may require the consent of retirees. The other cited cases (Pet. 20-21) are also inapposite, as they merely assume that the employer — unlike BFG — had made a promise to provide life-time unchangeable benefits. *See Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73; *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983); *Crane Ice Cream Co. v. Terminal Freezing & Heating Co.*, 128 A. 280 (Md. 1925). Were plaintiffs correct, moreover, no

corporation could commence a deal that, while clearly beneficial to the company and its public shareholders, might result in a slight detriment to unvested benefits. Nor could corporations ever reduce or terminate unvested benefits, decisions that self-evidently are not "solely for the benefit" of plan participants.

The Sixth Circuit's fiduciary-duty analysis is correct, factbound and does not conflict with any decisions of this Court or the lower courts. Nor does the decision implicate a recurring federal issue of national importance. The peti-tion, in this respect, should be denied.

II. The Sixth Circuit's Contract-Based ERISA Decision Applies Settled Law To The Unique Facts Of This Case And Does Not Conflict With Prior Decisions Of This Court Or Any Other Court.

For many of the same reasons that the first question presented does not warrant further review, neither does the second one — whether BFG made lifetime and unchangeable promises to its retirees to provide welfare benefits. Plaintiffs again attempt to find disarray in the circuits over the question when there is consistency and error when there is accuracy. They also overlook the fact that their primary legal argument has been waived and was not even essential to the decision below. Just last Term, moreover, the Court rejected an attempt to seek review of a similar decision by the Sixth Circuit. *See Sprague v. General Motors Corp.*, 133 F.3d 388 (6th Cir.) (*en banc*), *cert. denied*, 118 S.Ct. 2312 (1998).

A. The Sixth Circuit Did Not Create An "Almost Irrebuttable Presumption" Against Vesting.

Plaintiffs initially argue (Pet. 22) that the Sixth Circuit created an "almost irrebuttable presumption against 'vesting.'" But this strawman falsely characterizes what the court said as well as what it did. "Because vested benefits are forever

unalterable, and because employers are not legally required to vest them," the court sensibly concluded (like many courts before it) that such promises "'must be stated in clear and express language.'" Pet. App. 13a (quoting *Sprague v. General Motors Corp.*, 133 F.3d at 400 and *Wise v. El Paso Natural Gas Co.*, 986 F.2d 929, 937 (5th Cir. 1993), *cert. denied*, 510 U.S. 820 (1993)). A requirement that such long-term promises be stated "clear[ly]" simply does not create an "almost irrebuttable presumption" against them.

B. Plaintiffs Have Waived Any Challenge To The Sixth Circuit's Clear-Promise Requirement, Which In Any Event Does Not Conflict With Other Courts.

The same proclivity for overstatement undermines plaintiffs' second contention, namely (Pet. 22-25) that the Sixth Circuit's clear-promise requirement is wrong and conflicts with decisions from other circuits. Plaintiffs' disagreement with the standard has been waived. Even though the district court relied on a clear-promise requirement in rejecting plaintiffs' claims, Pet. App. 47a-48a, plaintiffs nowhere challenged that standard in their opening or reply briefs to the Sixth Circuit. On this record, they cannot do so now.

At any rate, the alleged conflict of authority does not pan out. Most of the decisions on which they rely arise in the distinct context of collective-bargaining agreements, and do not even help them at that. *See International Ass'n of Machinists & Aerospace Workers v. Masonite Corp.*, 122 F.3d 228, 231, 233 (5th Cir. 1997); *Diehl v. Twin Disc, Inc.*, 102 F.3d 301 (7th Cir. 1996); *Stewart v. KHD Deutz of America Corp.*, 980 F.2d 698, 702 (11th Cir. 1993); *United Paperworkers Int'l Union v. Champion Int'l Corp.*, 908 F.2d 1252, 1256 (5th Cir. 1990); *United Steelworkers v. Textron, Inc.*, 836 F.2d 6 (1st Cir. 1987); *Bower v. Bunker Hill Co.*, 725 F.2d 1221, 1223 (9th Cir. 1984). Claims of this sort arise

under the Labor-Management Relations Act, and the lower-court decisions — including, most prominently, plaintiffs' own cases — hold that such claims are governed by special rules applicable to labor agreements. As one of plaintiffs' featured cases pointedly acknowledges, different interpretive rules apply in this setting. "[C]ollective bargaining agreements," the Fourth Circuit has held, "are not interpreted under traditional rules of contract but under a federal common law of labor policy." *Keffer v. H.K. Porter Co.*, 872 F.2d 60, 62 (4th Cir 1989). Most of the other collective-bargaining cases on which plaintiffs rely make the same point. *See Masonite Corp.*, 122 F.3d at 231, 233 ("the rules of contractual interpretation are still applied with flexibility . . . in the context of labor contracts"; a reservation-of-rights clause that would control outside of a collective-bargaining situation "cannot vitiate contractually vested or bargained-for rights") (quotation omitted); *Stewart*, 980 F.2d at 702 ("[f]ederal substantive law governs the interpretation and enforcement of contracts covered by section 301(a) of the LMRA"; "the parol evidence rule should not be rigidly applied to labor contracts"); *Champion Int'l Corp.*, 908 F.2d at 1256 ("provisions of a labor contract may be more readily expanded by implication than those of contracts memorializing other transactions").

Still other flaws plague plaintiffs' reliance on these cases. Because the First Circuit's decision in *Textron*, for example, arose in a preliminary-injunction setting, the court saw no need to "weigh" "conflicting arguments" over the actual clarity of the employer's promises, but only to find that the requirements for preliminary relief had been met. 836 F.2d at 9. The Fourth Circuit in *Keffer* found that the pertinent "language" of the collective bargaining agreement in fact met a clear-promise requirement. The agreement, it concluded, made it "clear that all of the parties concerned fully anticipated that the Retirees' benefits would continue beyond the expiration of their collective bargaining agreement." 872 F.2d at 63. At any rate,

the suggestion that the Fourth and Sixth Circuits are at odds over this standard is thoroughly put to rest by the Fourth Circuit's recent conclusion that a "right to a fixed level of lifetime" medical benefits "must be stated in clear and express language." *Gable v. Sweetheart Cup Co.*, 35 F.3d 851, 855 (4th Cir. 1994) (quotation omitted) *cert. denied*, 514 U.S. 1057 (1995). The same defect hinders reliance on the Fifth Circuit's decision in *United Paperworkers*, since that circuit, too, has agreed that such promises "must be stated in clear and express language." *Wise v. El Paso Natural Gas Co.*, 986 F.2d at 937.

The non-collective-bargaining cases on which plaintiffs rely contain fatal deficiencies as well. Contrary to plaintiffs' suggestion (Pet. 24-25), *Alexander v. Primerica Holdings, Inc.*, 967 F.2d 90 (3d Cir. 1992), does not establish that the Third Circuit disagrees with the Sixth Circuit over whether ambiguous plans may give rise to vested rights. More recently, the Third Circuit (in an opinion written by the same judge who authored *Alexander*) explained that vested rights "must be found in the plan documents and stated in clear and express language." *In re Unisys Corp. Retiree Medical Benefit "ERISA" Litig.*, 58 F.3d 896, 902 (3d Cir. 1995). And the Eighth Circuit's decisions in *Barker v. Ceridian Corp.*, 122 F.3d 628 (8th Cir. 1997), and *Jensen v. SIPCO, Inc.*, 38 F.3d 945 (8th Cir. 1994), *cert. denied*, 514 U.S.1050 (1995), are also unhelpful. In *Barker*, the employer's reservation of rights was itself ambiguous, and actually suggested that plaintiffs' benefits were vested. 122 F.3d at 635-36. That holding does not conflict with the outcome in this case, where the "Highlights" booklet clearly reserved BFG's rights to modify or terminate welfare benefits. *Jensen*, in turn, reaffirms the point, concluding that "a reservation-of-rights provision is inconsistent with, and in most cases would defeat, a claim of vested benefits." 38 F.3d at 950.

Plaintiffs also make a passing reference (Pet. 25) to two cases decided by the Ohio Supreme Court. *Luli v. Sun Products Corp.*, 398 N.E.2d 553 (Ohio 1979); *Cantor v. Berkshire Life Ins. Co.*, 171 N.E.2d 518 (Ohio 1960). Both cases, however, were decided under Ohio law, did not concern ERISA, did not address the merits of a clear-promise requirement, and at any rate concerned pension, not welfare, benefits.

Still less have plaintiffs identified any tension between the Sixth Circuit's analysis and the decisions of this Court. The only Supreme Court case they discuss (Pet. 25) in any detail — *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989) — is factually and legally inapposite. It does not address the clear-promise argument made here, and instead construes only the meaning of plan "participant" under 29 U.S.C. § 1002(7) and the appropriate standard of review for an action challenging the denial of severance benefits after a workforce reduction.

The alleged conflict of authority in the end does not withstand scrutiny. The cited cases either are inapposite or are not inconsistent with the Sixth Circuit's analysis, or in some instances both. Most critically, plaintiffs have yet to identify a single circuit court decision, state supreme court decision, or decision from this Court in which they would prevail on these facts.

C. Because The Sixth Circuit And District Court Alternatively Concluded That BFG Unambiguously Chose Not To Promise Lifetime Welfare Benefits, The Petition Does Not Squarely Raise The Question Presented.

Even aside from the absence of disagreement on the issues presented and even aside from plaintiffs' failure to allege, let alone show, that the issue raised is of national importance, the petition should be denied for still another reason. The case

presents a poor vehicle for looking at the question whether ambiguous promises may vest lifetime welfare benefits. The rule plaintiffs propose, it turns out, would not even have made an impact on the outcome of this case. The district court ultimately concluded that "the plan documents are not ambiguous" as to whether BFG intended to vest welfare benefits. Pet. App. 14a n.7. And in finding for itself that "the plan documents are not ambiguous," the Sixth Circuit ultimately reached the same conclusion, even without considering the explicit reservation of rights contained in the "Highlights" booklet. *Id.* The Sixth Circuit also specifically countered the two pieces of language from the summary plan descriptions on which plaintiffs rely, aptly recognizing that they were descriptive, not promissory. The court found that the one phrase in the 1977 Hospitalization Plan — "if you retire and are eligible for a pension you shall continue to have the same health coverage" — "neither expressly guarantees lifetime benefits nor creates an ambiguity as to whether such benefits are vested." Pet. App. 14a. And it found that the other provision at most contained an implication, but did not create an ambiguity, again without even considering the effect of the repeated and unambiguous reservation of rights included in the "Highlights" booklets. *Id.* Neither conclusion is particularly remarkable, particularly in light of plaintiffs' prior statement through counsel to the district court that the claimants "do not challenge the abstract legal right of [BFG] to amend or terminate retiree welfare benefit plans." Pet. App. 51a.

Under these circumstances, the question whether ambiguous documents may give rise to vested rights is not presented here, and thus the Court would have no occasion to address the rules governing the construction of allegedly ambiguous plans. Ultimately, plaintiffs' core disagreement with the Sixth Circuit goes not to a dispute over legal principles but to a dispute over the correct interpretation of the unique facts presented by a

voluminous record. But that dispute, as Rule 10 makes clear, only "rarely" warrants the Court's attention. This unexceptional decision, we respectfully submit, simply is not one of those cases. *See United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant certiorari to review evidence and discuss specific facts").

CONCLUSION

For the foregoing reasons, the petition should be denied.

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February 1999

Supreme Court, U.S.
FILED
FEB 22 1999
CLERK

No. 98-950

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

GLEN H. SENGPIEL, DONALD E. KELLY
and DONALD R. GOTTSCHALK,

Petitioners,

vs.

THE B.F. GOODRICH COMPANY, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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Restatement (Second) of Contracts § 318(3)	4

APPENDIX

Page

Appendix A — Goodrich Disclosure Schedule Section 4.12(b)(ii)(A) to the Joint Venture Agreement, "Employee Selection Method" 1a

STATEMENT OF THE CASE

Respondents, referring to the "Highlights" booklet, imply that Goodrich reserved a right of amendment in its welfare benefit plans. (Michelin Brief at 1-2; Goodrich Brief at 1-2.) But, as found by the District Court, the Highlights booklet does not meet the requirements of a Summary Plan Description. (App. B at 45a-46a.) Respondents then refer to the reservation of rights clause contained in the 1986 Summary Plan Description for the Retiree Health Care Plan. (Michelin Brief at 2; Goodrich Brief at 2.) But this plan was adopted after petitioners had been assigned to the UGTC plans and is therefore not material. (App. B at 22a.) As the courts below found, the SPDs at issue contain no clause reserving a right to amend, suspend, or terminate the plans. (App. A at 4a, App. B at 46a.)

Respondents, contending that petitioners benefited by their transfer to UGTC, then refer to Goodrich's decision to reduce the medical benefits in 1990 by increasing the medical deductible from $100 to $150 a month for one covered individual and from $200 to $300 for two or more. (Michelin Brief at 5; Goodrich Brief at 3; Jt. Apx. 764-66.) But this modest decrease in medical benefits was more than offset by a $40.00 a month increase in the pension benefit. (App. B at 29a; Jt. Apx. 764-66.) The transferred corporate retirees did not receive the $40.00 a month pension increase because they had been transferred to the UGTC pension plan. They were not benefited by the transfer.

REASONS FOR GRANTING THE WRIT

I.

PETITIONERS' BREACH OF FIDUCIARY CLAIM.

A. There is a Genuine Conflict Between the Decision Below and the Eighth Circuit's Decision in *Howe v. Varity Corp.*, 36 F.3d 746, 756 (8th Cir. 1994).

Respondents argue that petitioners are manufacturing a conflict because the Eighth Circuit's holding in *Howe v. Varity Corp.*, 36 F.3d

746, 756 (8th Cir. 1994) ("*Howe II*"), was grounded on false communications made in connection with the transfer of welfare plan obligations. In *Howe II*, there were three categories of plaintiffs: (1) ten individual retirees, who, like the petitioners, had retired before Massey Combines was created and who had been involuntarily transferred to Massey Combines; (2) a class of active, pre-divestiture employees who had been fraudulently induced to sign on with Massey Combines and who had retired before its bankruptcy; and (3) a class of active, pre-divestiture employees who had been fraudulently induced to sign on with Massey Combines and were still employed by Massey Combines at the time of bankruptcy. This Court in granting certiorari considered (1) whether the employer was acting in its capacity as an ERISA "fiduciary" when it deliberately mislead the employees, (2) whether in misleading the employees, the employer violated ERISA's fiduciary obligations, and (3) whether ERISA § 502(a)(3) authorized plan beneficiaries to bring a lawsuit seeking relief for individual beneficiaries harmed by the administrator's breach of fiduciary duty. *Varity Corp. v. Howe*, 516 U.S. 489, 492 (1996). In considering these questions, this Court considered only the claims of the second and third classes of plaintiffs described above, that is, those employees who had been deceitfully induced to transfer to Massey Combines.

This Court did not review on certiorari that part of *Howe II* that considered Varity and Massey-Ferguson's transfer of the retirees who had been involuntarily transferred to Massey Combines.

> [F]or as we construe Varity's petition, it does not sufficiently call into question the District Court's holding that Varity breached a fiduciary duty with respect to the Massey-Ferguson retirees whose benefit obligations had been involuntarily assigned to Massey Combines. With these limitations, we turn to the questions presented.

Varity Corp. v. Howe, *supra*, 516 U.S. at 496. Therefore, that part of the opinion in *Howe II*, part V, dealing solely with the ten individual retirees, was not reviewed by this Court. Part V of *Howe II* has nothing to do with false communications made in connection with the transfer of welfare plan obligations because there were no false

communications to the retirees. They were simply transferred, involuntarily, to the successor's plans.

There is an important difference between active employees and those employees who have already retired. In a corporate spinoff, active employees who work for the business being divested have a choice. They may elect to transfer to the new company, they may choose to find employment elsewhere, or, if eligible, they may take early retirement. Retirees, on the other hand, as in this *Sengpiel* case, are simply transferred without their consent, and sometimes without their knowledge, to the retirement rolls of the new entity's plans. "Their consent was not solicited" either by Goodrich or Uniroyal. (Ong Depo., Jt. Apx. 548.) In short, active employees who elect to sign on with the new company, by voluntarily accepting employment with the successor, consent to the transfer of their pension and welfare obligations to their new employer, whereas employees who have already retired do not consent.

Michelin argues that a plan sponsor can free itself of "contractually created duties" by simply taking back the obligation and then *terminating and extinguishing* it. (Michelin Brief at 14.) This assertion cannot be correct. Goodrich's obligation to its retirees is not illusory. If a plan sponsor has created a "contractually created duty," then it cannot "free itself" of that obligation by terminating and extinguishing it. What Michelin really means is that welfare benefits are gratuitous. But this notion is contrary to the understanding of employees and their families, who plan for retirement on the assumption that their benefits are a firm obligation of their employer. The employee relies upon the "character, credit, and substance" of the employer for whom he or she has worked. What the Eighth Circuit meant in *Howe II* is that the employer "cannot unilaterally relieve [itself] of obligations to the individual retirees" to *sponsor, provide, and be responsible for* retiree pension and welfare benefits. Also, if Michelin is right in contending that the "obligation" of the employer is at the will of the employer, then why did Goodrich enter into an indemnification agreement with UGTC? (App. B at 28a; Jt. Apx. 924-25.)

The correct legal analysis is that while Goodrich could delegate its obligation to provide retiree benefits to UGTC, it could not "free itself" of its retiree obligations by assigning them to UGTC. Goodrich's contractual obligation to its retirees was not assignable between Goodrich and its retirees because Goodrich could not by its own act or by any agreement with UGTC cast off its liability and substitute UGTC without the consent of the retirees. This is precisely the point that the Eighth Circuit made in part V of *Howe II*, citing *Restatement (Second) of Contracts* § 318(3), comment d. Goodrich retained its primary responsibility to provide and sponsor welfare benefits to its retirees. It was for that reason that it entered into an indemnification agreement with UGTC.

B. Goodrich Acted in a Fiduciary Capacity Under ERISA § 4044 in Selecting and Assigning Participants and Allocating Funds and Responsibility to the UGTC Plans.

The District Court put the issue succinctly:

> To some extent, spinning off members of a plan is *sui generis*; it falls easily into no category. . . . [T]he Court essentially must choose whether the spinoff is more akin to 1) amending, modifying or terminating the then-existing plans (in which case it would not be a fiduciary act), or 2) managing or administering those plans (in which case it would be a fiduciary act).

(App. B at 40a.) The District Court, and the Court of Appeals, decided that all of Goodrich's actions in implementing the spinning off of its tire division came down on the side of "amending, modifying, or terminating" the previously existing plan and not on the "managing" or "administering" side.

ERISA § 4044(a) provides in part:

> **(a) Order of priority of participants and beneficiaries**
>
> In the case of the termination of a single-employer defined benefit plan, the plan *administrator* shall allocate

> the assets of the plan (available to provide benefits) among the participants and beneficiaries of the plan in the following order: . . . (Emphasis added.)

Petitioners do not question that Goodrich's decision to divest itself of its tire business and its decision to terminate its one pension plan covering all Goodrich employees and retirees and their beneficiaries, whether salary or wage, and create four separate plans (Salaried Tire, Wage Tire, Salaried Non-Tire, and Wage Non-Tire) were employer/settlor functions not impacted by ERISA. However, Goodrich, after creating the four separate plans, was necessarily performing an administrative-fiduciary function when it selected and assigned participants and allocated funds to the four newly created plans. This is so because the decision as to which participants to assign to which plan and what funds should be allocated to each plan necessarily involved the exercise of "discretionary authority" or "discretionary control" "respecting management or disposition of [plan] assets." ERISA § 3(21)(a)(i). The pigeonholing of participants into one of the four plans is a congressionally defined fiduciary function under ERISA § 4044 (included under Title IV — Plan Termination Insurance, Subtitle C — Terminations).

In fact, in selecting and assigning participants and funds, Goodrich stated that it complied with ERISA § 4044:

> Effective March 14, 1986, The B.F.Goodrich Retirement Program was split into four plans based on Section 4044 of ERISA. Separate wage and salary plans for both Tire Group and remaining BFG employees were established. . . .

(Goodrich Disclosure Schedule Section 4.12(b)(ii)(A) to Joint Venture Agreement, "Employee Selection Method," Jt. Apx. 62, 838, Reply Brief Apx. A.) The selection/assignment/allocation process is more than a "ministerial application of a percentage classification to implement [Goodrich's] business decision" not amounting to an exercise of discretion.

Michelin cites *Curtis-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995), *Lockheed Corp. v. Spink*, 517 U.S. 882, 890 (1996), and *Hughes Aircraft Co. v. Jacobson*, No. 97-1287, 67 U.S.L.W. 4122 (Jan. 25, 1999) for the proposition that spinning off its tire division was a settlor function. (Michelin Brief at 14-15.) *Schoonejongen* holds that "[e]mployers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans." 514 U.S. at 78. *Lockheed Corp. v. Spink* decided that Lockheed acted not as a fiduciary but as a settlor when it amended the terms of a plan to include retirement programs, but this Court did not decide whether the Retirement Committee members acted as fiduciaries when they paid out benefits according to the terms of the Amended Plan. 517 U.S. at 892. *Hughes Aircraft Co. v. Jacobson*, *supra*, holds that:

> The act of amending a pre-exising [sic] plan cannot as a matter of law create two *de facto* plans if the obligations (both preamendment and postamendment) continue to draw from the same single, unsegregated pool or fund of assets.

67 U.S.L.W. 4125. *Hughes* is distinguishable from this *Sengpiel* case because Goodrich created four new, separate plans, selected participants from the terminated plan, assigned participants to one of the four plans, and allocated funds and responsibility. The same single, unsegregated pool was not used to pay benefits. In fact, John Ong, Goodrich's chief executive officer, insisted that the transferred pension plan retain its separate identity "unless all plans which are part of the merger are fully funded." (Ong's letter to Gottschalk, Exh. A, App. B at 62a-64a.) Those retirees who were assigned to the new tire pension plans, either salaried or wage, were then assigned to the UGTC retirement rolls for purposes of providing welfare benefits.

C. Principles of Contract Law as Well as Trust Law Should Be Utilized to Develop a Federal Common Law of Rights and Obligations Under ERISA-Regulated Plans.

Michelin also argues that contract assignment principles do not square with ERISA's regulatory scheme. (Michelin Brief at 16-19.) Pre-ERISA actions challenging denial of benefits were governed by principles of contract law. *Firestone Tire and Rubber Co. v. Bruch*,

489 U.S. 101, 112 (1989). As this Court said in *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996):

> [T]rust law does not tell the entire story. After all, ERISA's standards and procedural protections partly reflect a congressional determination that the common law of trusts did not offer completely satisfactory protection. (Citations omitted.) . . . Congress "expect[ed] that the courts will interpret this prudent man rule (and other fiduciary standards) bearing in mind the special nature and purpose of employee benefit plans," *id.*, at 302, 3 Leg. Hist. 4569, as they "develop a 'federal common law of rights and obligations under ERISA-regulated plans.' "

Respondents, and the courts below, confuse the design of a plan with the management and administration of the plan. Admittedly, Goodrich can design any plan, or no plan, as it wishes. But once it has designed a plan, it must administer and manage that plan "solely in the interests of the participants and beneficiaries." ERISA § 404(a)(1). Moreover, it is questionable whether trust law principles should be exclusively applied to unfunded welfare plans where there is no trust corpus.

Michelin argues that ERISA "implicitly permits one plan sponsor to be substituted for another — without requiring any amendment or modification of the underlying employee benefit plan documents." (Michelin Brief at 19.) But this begs the question. The issue is, assuming Goodrich could substitute UGTC as the plan sponsor, can Goodrich thereby extinguish its obligation and responsibility to provide welfare benefits to the transferred retirees to the same level as it provides to those retirees who were not transferred?

II.

PETITIONERS' CONTRACT-BASED CLAIM.

A. The ERISA Standard for the Vesting of Welfare Benefits Should Be the Same for Non-Union as for Union Retirees.

Respondents argue that the standard for union retirees is different than the standard applicable to non-union retirees (such as petitioners), that the decisions can be reconciled on the basis of a collective bargaining agreement and that there is therefore no conflict in the circuits. For three reasons, this Court should reject respondents' argument that there is an appropriate double standard.

First, among the cases petitioners cited that apply a standard at odds with *Sengpiel* are those involving *non*-union employees, *e.g.*, *Alexander v. Primerica Holdings, Inc.*, 967 F.2d 90, 96 (3d Cir. 1992), and *Bower v. Bunker Hill Co.*, 114 F.R.D. 587, 594-95 (E.D. Wash. 1986) *on remand from* 725 F.2d 1221 (9th Cir. 1984) (class included both union and non-union, and same standard applied). *See also Eardman v. Bethlehem Steel Corp.*, 607 F. Supp. 196 (W.D.N.Y. 1984).

Second, *nothing* in the decisions in *Sengpiel* or *Sprague v. General Motors Corp.*, 133 F.3d 388 (6th Cir.) (*en banc*), *cert. denied*, __ U.S. __, 118 S. Ct. 2312 (1998) (or in any other appellate case in which non-union retirees lost) distinguishes the long line of pro-retiree decisions on the grounds that they concerned union retirees. Indeed, in *In re White Farm*, 788 F.2d 1186, 1192 (6th Cir. 1986), the Sixth Circuit itself declared that even though the retiree benefit claim was brought by non-union retirees solely under ERISA, the court must "look to basic contract law," and it "must, in this case as in *Yard-Man* and the other collective bargaining agreement cases, interpret the contract's terms." *Id.*[1] *White Farm* went on to note that "courts may draw inferences or make presumptions as this court has done in

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1. *Yard-Man* refers to *UAW v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984), which found — directly contrary to *Sprague* and *Sengpiel* — that "silence" on the vesting question should not be seen as an indication that benefits are not vested, but rather the proper "inference" is that the benefits are indeed vested. This part of *Yard-Man* has been followed by a number of the other circuit decisions.

construing collective bargaining agreements providing welfare benefit plans." *Id.* at 1193.

Third, analytically, there is not reason why there should be a double standard. While *Yard-Man* and other union decisions cited federal labor law as one of a number of factors supporting its adoption of the pro-retiree "inference," it also cited the body of pre-ERISA precedent applying the modern "contractual" view of retirement benefits even for non-union retirees. 716 F.2d at 1480-82. Non-union retirees are as powerless as union retirees to bargain for benefits after they retire — and this fact supports the same inference that the original intent underlying the benefits was that they were to last for life.

Furthermore, non-union retirees should get the benefit of even *more* favorable rules of contract construction than those enjoyed by union retirees. Since non-union retirees' rights stem from documents drafted solely by the employer (in contrast to the union setting), the court should employ the *contra proferentum* doctrine, construing ambiguous language most strongly against the party who has selected that language. 17 Am. Jur. 2d, *Contracts* § 276.

B. *Curtis-Wright v. Schoonejongen*, 514 U.S. 73 (1995), Did Not Create a Virtually Irrebuttable Presumption Against Vesting.

Respondents are plainly wrong in characterizing *Curtis-Wright v. Schoonejongen*, 514 U.S. 73 (1995), as some sort of watershed case which created a very strong presumption against vesting and which essentially overruled the principles underlying cases such as *Primerica*, *supra*, *Jensen v. Sipco, Inc.*, 38 F.3d 945 (8th Cir. 1994), *cert. denied*, 514 U.S. 1050 (1995), and *Bower v. Bunker Hill Co.*, *supra*. *Schoonejongen* does not even mention any of these cases, and gives no indication that it disapproves of their reasoning. Indeed, in *International Association of Machinists and Aerospace Workers v. Masonite*, 122 F.3d 228, 231-33 (5th Cir. 1997), the citation to *Schoonejongen* is but one illustration that it had no effect on the law concerning "vesting" of retiree health benefits. Both before and after *Schoonejongen*, the law remains the same: There are no "magic words" which are necessary to create "vested" rights. *Sengpiel* deviates from these authorities and creates a presumption against vesting which is virtually irrebuttable.

CONCLUSION

For these reasons, the Petition for Writ of Certioriari should be granted.

Respectfully submitted,

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APPENDIX A — GOODRICH DISCLOSURE SCHEDULE SECTION 4.12(b)(ii)(A) TO THE JOINT VENTURE AGREEMENT, "EMPLOYEE SELECTION METHOD"

* * *

Effective March 14, 1986, The B.F.Goodrich Retirement Program was split into four plans based on Section 4044 of ERISA. Separate wage and salary plans for both Tire Group and remaining BFG employees were established.

Active employees were assigned a pension plan based on their work location and division code as of March 14, 1986. All active employees associated with Tire Group operations were assigned to one of the Tire Group pension plans.

Terminated deferred vested employees were assigned to the Tire Group Plans based on their work location when they terminated. All terminated deferred vested employees whose work location was associated with Tire Group operations were assigned to a Tire Group pension plan.

All retirees who retired from plant locations associated with Tire Group operations were assigned to a Tire Group pension plan. All retirees who retired from Port Neches, Orange and Institute were identified and assigned to Tire Group.

Akron retirees were identified based on the department from which they retired. All Akron retirees who retired from a department associated with Tire Group were assigned to a Tire Group pension plan. Other Akron retirees were identified depending on the department from which they retired. Remaining Akron retirees, who retired from Corporate or a department which was not related to any specific operating division, were considered Corporate retirees. A portion of these

remaining retirees were assigned to a Tire Group pension plan based on the fact that Corporate Group provided services to BFG's Tire businesses. Controller Division analyzed the percentage of costs allocated to Tire Group in 1985. Based on this analysis, 42.54% of the remaining Akron retirees were assigned to Tire Group based on social security numbers.

The participants included in the Automotive Proving Grounds (APG) actuarial valuation were those individuals who were participants of the respective APG plan on the date liabilities were valued.